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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1268

GEORGE MARTINEZ, et al.,

Appellants,

vs.

THE STATE OF CALIFORNIA, et al.,

Appellees.

On Appeal From The Court Of Appeal
Of The State Of California,
Fourth Appellate District, Division One

BRIEF OF APPELLEES

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Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice*, 1966 Wash. U.L.Q. 243 37

Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions* (1970) 23 J. Legal Ed. 24 46

Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways* (1968) 4 Trial 29 46

Devitt and Blackmar, *Federal Jury Practice & Instructions* 58

Diamond, *The Psychiatric Prediction of Dangerousness* (1975) 123 U.Pa. L.Rev. 439 46

Ennis & Litwack, *Psychiatry, and the Presumption of Expertise: Flipping Coins in the Courtroom*, (1974) 62 Cal.L.Rev 693 46

Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L.Rev. 209 (1963) 62

Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment* (1968) 117 U. Pa.L.Rev. 75 46

McCormack, *Federalsim and Section 1983*, 60 Va.L.R. 1 (1974) 58,66

Monahan, *The Prevention of Violence, in Community Mental Health and the Criminal Justice System* (Monahan edit. 1975) 46

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MISCELLANEOUS (Continued)

N. Morris, *The Future of Imprisonment* 47 (1974) 37

W. Prosser, *Law of Torts* (4th Ed. 1971) 60,62

Rubin, *Prediction of Dangerousness in Mentally Ill Criminals* (1972) 27 Archives of Gen. Psychiatry 397 46

Shapo, *Constitutional Tort: Monroe v. Pape and Beyond*, 60 Nw. U.L.R. 277 (1965) 60

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Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry* (1973) 1 J. Psychiatry & L. 409 46

Steadman & Cocozza, *We Can't Predict Who is Dangerous* (1975) 8 Psych. Today 32 46

A. von Hirsch & K. Hanrahan, *Abolish Parole?* (1978) 37

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Wenk, Robinson & Smith, *Can Violence Be Predicted?* (1972) 18 Crime & Del. 393 46

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, is reported at 85 Cal.App.3d 430, 149 Cal.Rptr. 519, and is set forth in the Appendix at page 38.

JURISDICTION

The opinion below of the Court of Appeal of the State of California, Fourth Appellate District, Division One was filed on September 22, 1978. On November 15, 1978, the California Supreme Court denied Appellants' Petition for Hearing. Appellants' Jurisdictional Statement was filed and docketed in this Court on February 14, 1979, and on May 21, 1979, this Court issued an order noting probable jurisdiction of this matter. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case further involves California Government Code section 845.8(a) which states:

> "Neither a public entity nor a public employee is liable for:
>
> "(a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

This case also involves section 1983 of Title 42, United States Code which states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

QUESTIONS PRESENTED

I. Does the determination to parole a prisoner into society create civil damage liability on the part of state parole officials under 42 U.S.C. § 1983 where the parolee causes the death of a member of the general public?

II. Does the public entity and public employee immunity for injuries resulting from a determination to parole or release a prisoner, or from determining the terms and conditions of parole or release, or from determining whether to revoke parole or release embodied in California Government Code section

845.8(a), violate either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT

Appellees, due to embellishment of the facts by appellants in their "Statement Of The Case," and various inaccuracies contained therein, do not concur with the contents of appellants' "Statement Of The Case," and elect to submit this Statement.

This case involves a suit consisting of wrongful death and 42 U.S.C. § 1983 claims and seeks compensatory damages of $1 million and punitive damages of $1 million from the State of California and several of its parole officials based upon their determination to parole into society one Richard June Jordan Thomas (Thomas) who, approximately five months after he was released, took the life of Mary Ellen Martinez.

The state trial court sustained demurrers to the original complaint and a first amended complaint and dismissed the action. The California Court of Appeal, Fourth Appellate District, Division One, affirmed the judgment of dismissal, holding that the wrongful death causes of action were barred by the state tort immunity for a determination to parole a prisoner, contained in California Government Code section 845.8(a), and ruling that the 42 U.S.C. § 1983 cause of action was barred by an immunity for the quasi-judicial function of parole release. The California Supreme Court denied appellants a hearing. The Court noted probable jurisdiction on May 21, 1979.

Appellants are the parents, brother and sister of Mary Ellen Martinez, the victim of parolee Thomas (A. 2,20). Appellees are the State of California and its parole officials who, it is alleged, were at all relevant times engaged in performing duties for the California Adult Authority and the California Department of Corrections, and who released Thomas on parole.[1]/

In the first cause of action, appellants allege Thomas was found guilty of attempted rape upon two young females in 1969, certified as a mentally disordered sex offender not amenable to treatment, sentenced 1 - 20 years in state prison, and, after 5 years of imprisonment, came before appellees on his request for parole.

Appellants allege that with the knowledge of the foregoing facts combined with the knowledge that the court had made a recommendation of no parole for Thomas, that Thomas received no psychiatric treatment, and that Thomas expressed animosity and resentment towards his mother, appellees released Thomas on parole (A.4-5). In the first cause of action of both the original and first amended complaints, appellants

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[1]/ In the original complaint, appellants incorporated by reference into all six causes of action the introductory allegation that appellees at all times mentioned in the complaint were engaged in performing duties for the California Adult Authority and the California Department of Corrections (A. 3-11). In the first amended complaint, wherein appellants were allowed to amend the first and sixth causes of action, appellants merely omitted this introductory allegation from those two causes of action and pleaded in conclusionary fashion that appellees did not parole Thomas within the course and scope of their employment because the "release of this assasin" was not "conduct that would or could be anticipated by the [State]." (A. 22-24, 29).

allege a theory of negligent release, and claim their *own* cause of action for the deprivation of care, comfort, support, protection and society of Mary Ellen Martinez (A. 6,24).

Appellants, in their "Statement Of The Case," present to the Court the following "facts" which were never alleged in either complaint:

> "THOMAS was paroled even though he admitted to authorities that he did not feel himself ready for parole and feared actions he might take if he in fact was paroled. THOMAS' parole was subject to special conditions. . . ." (Appellants' Br. 5).

Appellants allege in the second cause of action of the original and first amended complaints that the parole officials herein did not comply with certain requisite parole formalities, which appellants do not specify, and thereupon incorporate by reference earlier allegations of negligent release of Thomas (A. 6-7, 25).

The third cause of action of the original and first amended complaints alleges that the parole officials had a duty to warn females who might use the Tecolote Canyon area of Thomas' presence in the area and his violent propensities.[2]/ In their Statement Of The Case, appellants state their third cause of

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[2]/ At oral argument before the California Court of Appeal, counsel for appellants conceded that the third cause of action for negligent failure to warn females using Tecolote Canyon of the danger created by Thomas' release should be dismissed as there was no "continuing relationship" between the state and the victim, a condition precedent established by California case law for this type of tort (A. 41).

action alleges "parole officials negligently and *recklessly* failed to warn probable victims of their release of Thomas," (Appellants' Br. 6) whereas, in fact, the third cause of action alleges only carelessness and negligence regarding the alleged failure to warn (A. 9, 27).

The fourth cause of action of the original and first amended complaints alleges, in conclusionary language, without any supporting facts, appellee parole officials willfully, wantonly, and maliciously failed to supervise Thomas while he was on parole (A. 9, 27).

Appellants attempt, in the fifth cause of action of the original and first amended complaints, to set forth facts sufficient to state a claim under the Federal Civil Rights Act, 42 U.S.C. § 1983. Appellants allege that the parole officials at all relevant times were acting under color of state law, namely, California Penal Code sections 5075[3]/ and 5077.[4]/ Appellants, in an

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[3]/ California Penal Code section 5075 provides:

> "The Community Release Board shall be composed of nine members, each of whom shall be appointed by the Governor, with the advice and consent of the Senate, for a term of four years and until the appointment and qualification of his successor. Members shall be eligible for reappointment. Two of the original appointees shall be persons who were members of the Adult Authority immediately prior to July 1, 1977, and two shall be persons who were members of the Women's Board of Terms and Parole immediately prior to July 1, 1977.
>
> "The Chairman of the board shall be designated by the Governor from time to time. The chairman shall be the administrative head of the board and shall exercise all duties and functions necessary to insure that the responsibilities of the board are successfully discharged. He shall be the appointing

(Footnote 3 continued on page 8. Footnote 4 on page 8.)

attempt to identify a constitutional right protectable by 42 U.S.C. § 1983 allege they "have been deprived of the society, protection, services and support of Decedent, MARY ELLEN MARTINEZ." This allegation is preceded and followed by oblique references to the constitutional principle that a person cannot be deprived of life without due process of law (A. 10-11, 28-29).[5] In their Statement Of The Case, appellants state that

(Footnote 3 continued)

authority for all civil service positions of employment in the board.

"The terms of members shall expire as follows: two on March 15, 1978, two on March 15, 1979, two on March 15, 1980, and three on March 15, 1981. Successor members shall hold office for terms of four years, each term to commence on the expiration date of the term of the predecessor. The Governor shall fill every vacancy for the balance of the unexpired term. The selection of persons and their appointment by the Governor and confirmation by the Senate shall reflect as nearly as possible a cross-section of the racial, sexual, economic, and geographic features of the population of the state.

"It is the further intent of this section that the board shall adopt such policies and practices as will permit continuing operations and improvements without any further increase in the number of its members."

[4] California Penal Code section 5077 provides:

"The Community Release Board shall review all prisoners' requests for reconsideration of denial of good time credit, and setting of parole length or conditions, and shall have the authority to modify the previously made decisions of the Department of Corrections as to these matters. The revocation of parole shall be determined by the Community Release Board."

[5] It is, therefore, apparent that appellants were attempting to establish at the pleading stage their own cause of action for

(Footnote 5 continued on page 9.)

the fifth cause of action alleges the parole officials subjected Mary Ellen Martinez to deprivation of a fundamental constitutional right without due process (Appellants' Br. 6). However, as already pointed out, the "underlying right" pleaded in the fifth cause of action appears to be one which is allegedly vested personally in appellants, to wit, loss to them of comfort and society of Mary Ellen Martinez due to her death.

Appellants, in their brief (Appellants' Br. 14) state that the sixth cause of action, as well as the fifth, is for violation of the Federal Civil Rights Act. However, as the sixth cause of action was pleaded in the original and first amended complaints, it was never expressly set forth as a 42 U.S.C. § 1983 claim, as was the fifth cause of action (A. 10-13, 28-31). Further, it appears clear that the California Court of Appeal, rather than perceiving the sixth cause of action as a Federal Civil Rights claim, interpreted that cause of action to sound in negligent failure to revoke parole, supervise Thomas, and warn young females. The sixth cause of action alleges the parole officials willfully and maliciously failed to correct the negligent paroling of Thomas, failed to supervise Thomas, and failed to warn females using Tecolote Canyon of Thomas' presence or propensities (A. 11-13, 29-31).

(Footnote 5 continued)

deprivation of the society, comfort, etc., of Mary Ellen Martinez, as opposed to bringing a cause of action as personal representatives of the estate of Mary Ellen Martinez for the loss of her life, as was done by surviving family members in the Kent State disorders of 1970. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

SUMMARY OF ARGUMENT

Appellants, in bringing this 42 U.S.C. § 1983 action against these parole officials have not set forth facts sufficient to constitute a claim under that section as they have failed to identify a constitutional right cognizable under § 1983 and infringed by appellees, a necessary first step in any § 1983 action. *Baker v. McCollan*, ___ U.S. ___, 47 U.S.L.W. 4834 (1979). Although appellants allege the decision to release Thomas on parole violated Mary Ellen Martinez' right to life and deprived appellants of the comfort and society of Mary Ellen Martinez, it is clear appellants are merely substituting the tort element of causation for the requirement of identifying a constitutionally protected right under § 1983.

At the time these parole officials determined to release Thomas, it is clear the object and purpose of their act was the rehabilitation of this parolee, not the deprivation of any rights, constitutional or otherwise, of appellants or Mary Ellen Martinez. Any such right could not have been within the contemplation of appellees when Thomas was released. The loss of Mary Ellen Martinez' life resulted from the act of Thomas which in no conceivable fashion can be raised to the level of state action. Appellants' effort to transmute the violent conduct of Thomas into state action must fail in the absence of allegations of conspiracy or agency between appellees and Thomas. To condone such an attempt would enlarge the boundaries of § 1983 to encompass all acts of recidivistic crime committed by parolees or probationers.

The California Court of Appeal correctly held that absolute immunity protects parole officials from § 1983 liability where the propriety or wisdom of the release of a parolee is

questioned. During the past sixty years the parole process has become an integral part of the penological system. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). The institution of parole is still, therefore, in an experimental stage. *Greenholtz v. Nebraska Penal Inmates*, ___ U.S. ___, 47 U.S.L.W. 4581, 4583 (1979). The prevailing view of those federal and state courts deciding the question has been that parole officials are absolutely immune from § 1983 liability for their determinations to release inmates on parole.

The Court, in *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) expanded the absolute immunity of judges from § 1983 liability to prosecutors for a number of important policy considerations including the recognition that § 1983 liability would have a chilling effect on the decision-making aspect of the prosecutorial function in our criminal justice system. *Id.*, at 425. Parole officials also play a vital quasi-judicial role in our criminal-penological system of justice and, for many of the same policy considerations identified by the Court in extending immunity to prosecutors, should also be extended absolute immunity from § 1983 liability. The wrath, loss and emotion of victims of recidivistic crime may easily be converted into the ascription of reckless and improper actions to the parole official. Unsupported allegations of malice, recklessness and gross negligence in connection with a parole release are easily made and, in the absence of absolute immunity, can be disproven only by evidentiary trial involving an inquiry into the circumstances and motivations of parole officials' decisions. Requiring a parole official to defend such a decision, perhaps years after it has been made, would impose intolerable burdens upon the official and, therefore, on the rehabilitative process.

Further, the prospect of a lay jury determining issues such as the motivations and circumstances surrounding a parole official's decision to release a prisoner, psychiatric indications and contraindications for parole of a prisoner, predictive capabilities of antisocial behavior of a prisoner (a subject now believed by many authorities to be beyond any meaningful predictive capability) and other esoteric matters, is to be avoided. To expect a jury to determine such issues in the context of a standard of gross negligence, or recklessness, would be a hopeless task and impose a chilling effect on the decision-making process of parole officials.

Such a chilling effect on a parole decision-making process would have drastic consequences upon the potential of deserving inmates to obtain release on parole. The absence of absolute immunity for parole officials would also disserve the interest society has in treating the parolee with basic fairness. *See Morrissey v. Brewer, supra,* 408 U.S. 471, 484.

Imposition of a qualified immunity would be an inferior remedy when the availability of alternative means to help ensure the integrity of the parole decision process exists. For example, discretion of parole officials to release inmates on parole can be reduced, input from law enforcement agencies and the public within the context of particular paroles can be encouraged, parole officials can be quickly removed from office for incompetence, and it is within the purview of a state to enact some form of reparations system for victims of crime, including recidivistic acts of violence.

Appellees submit that appellants' complaint, when shorn of improper conclusionary pleading is reduced to a claim of simple negligence for poor professional judgment. Without expressly

holding negligence is an insufficient basis to state a claim under § 1983, the implications of this Court's decisions and the prevailing view among the Federal Circuits is that § 1983 liability based upon negligence would subvert the historical intent of Congress in enacting the Ku Klux Klan Act of 1871 and render the courts a font of tort law.

The California Court of Appeal correctly held that California Government Code section 845.8(a), granting immunity to a parole official for determination to release a prisoner, does not violate constitutional due process or equal protection. The immunity statute does not involve any "fundamental rights," but is merely part and parcel of California's regulation of the nature and scope of, and procedure for, governmental tort liability. The statute involves no "suspect classification that would call for strict scrutiny standards." When the constitutionality of the immunity statute is decided on the principle of whether it is "rationally based" and "rationally related to the achievement" of "legitimate" governmental interests or objectives, it is clear that California Government Code section 845.8(a) must be upheld. The policies served by the immunity doctrine for parole officials are the same as the interests which underlie immunity for prosecutors and judges, *i.e.*, ensuring that parole officials' energies are not deflected from their duties in the rehabilitation process, and helping to guarantee that these officials will be able to exercise their independence of judgment required by their office unfettered by any fear of tort liability. These underlying interests were identified by the California Legislature in its adoption of the immunity statute and provide an adequate basis for upholding the section as against appellants' constitutional challenge.

ARGUMENT

I.

AT THE THRESHOLD, APPELLANTS HAVE NOT SET FORTH FACTS SUFFICIENT TO CONSTITUTE A CLAIM UNDER 42 U.S.C. § 1983

The Court recently, in *Baker v. McCollan, supra,* ____ U.S. ____, 47 U.S.L.W. 4834 (1979), reiterated a very basic principle concerning *any* 42 U.S.C. § 1983 suit:

> "In any event, before the relationship between the defendant's state of mind and his liability under § 1983 can be meaningfully explored it is necessary to isolate the precise constitutional violation with which he is charged. For § 1983 imposes civil liability only upon one
>
> > 'who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities *secured by the Constitution and laws*. . . .' 42 U.S.C. § 1983.
>
> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' "

The Court hastened to observe that identification of a constitutional right allegedly infringed in a particular case is a necessary and incipient step in a § 1983 suit. *Baker v. McCollan,*

supra, ____ U.S. ____, 47 U.S.L.W. 4834, 4836. Cf., *Paul v. Davis,* 424 U.S. 693, 700-701 (1976). Analysis of this necessary first step process here demonstrates that appellants have failed to state a claim under § 1983.

A. Appellees Have Not Deprived Mary Ellen Martinez Or Appellants Of Any Constitutional Or Other Right Cognizable Under 42 U.S.C. § 1983

The legislative history of § 1983 demonstrates that it was intended to "[create] a species of tort liability" in favor of persons who are deprived of "rights, privileges or immunities secured" to them by the Constitution. *Carey v. Piphus,* 435 U.S. 247, 253 (1978); *Imbler v. Pachtman, supra,* 424 U.S. 409, 417 (1976); *Mitchum v. Foster,* 407 U.S. 225, 238-242 (1972); *Monroe v. Pape,* 365 U.S. 167, 172-183 (1961).

Appellants have obliquely alleged the parole officials' determination to release Thomas on parole resulted in the loss of Mary Ellen Martinez' life, a right secured by the Constitution, and thereby deprived appellants of the care, society, comfort, and protection of Mary Ellen Martinez. Appellants, neither in their complaint nor in their brief satisfy the mandate of *Paul v. Davis, supra,* 424 U.S. 693, 700-701 (1976) and *Baker v. McCollan, supra,* ____ U.S. ____, 47 U.S.L.W. 4834 (1979), of identification of a constitutional right cognizable under § 1983 and allegedly infringed by appellees.

It cannot be gainsaid that *life* itself is a fundamental constitutional right cognizable under § 1983. Cf., *Scheuer v. Rhodes, supra,* 416 U.S. 232 (1974). Indeed, the Court, in view of the history and purpose of the Civil Rights Act as a means of

redress for deprivations of constitutional rights, has observed that lower federal courts have interpreted 42 U.S.C. § 1988 to fill the gap in § 1983 caused by the death of a victim by authorizing adoption of state survival statutes. *Moor v. County of Alameda*, 411 U.S. 693, 702-703, n. 14 (1973).[6]/

Appellants, however, rather than having brought this suit in their representative capacities, are apparently attempting to allege their own constitutional deprivation as a result of their loss of the deceased's society, care, comfort, etc. The Court has never recognized a parent's loss of a child's comfort and support to be a constitutional right cognizable under § 1983,[7]/ and were this case to seriously tender for consideration that issue, appellees would certainly oppose such a disturbing and unprecedented prospect.[8]/

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[6]/ See *Mattis v. Schnarr*, 502 F.2d 588, 590-593 (CA8 1974); *Spence v. Staras*, 507 F.2d 554 (CA7 1974); *Hall v. Wooten*, 506 F.2d 564 (CA6 1974); *Brazier v. Cherry*, 293 F.2d 401 (CA5 1961), *cert. denied*, 368 U.S. 921; *Pritchard v. Smith*, 289 F.2d 153 (CA8 1961). California has also recognized this policy. *Alvarez v. Wiley*, 71 Cal.App.3d 599, 604, 139 Cal.Rptr. 550 (1974).

[7]/ Appellees are mindful that a few lower federal courts have recognized a constitutional right to parenthood cognizable under § 1983. *E.g., Mattis v. Schnarr, supra*, 502 F.2d 588, 593-595 (CA8 1974); *Jones v. McElroy*, 429 F.Supp. 848, 852-853 (E.D. Pa. 1977), but question whether loss of parenthood is to be equated with loss of comfort and support.

[8]/ If loss of a child's comfort and support is perceived to be a cognizable right under § 1983, it would be illogical to condition such recovery upon the death of a child, especially in cases where serious injury to a child resulted in loss of comfort or society or in emotional distress on the part of a parent. See *Carey v. Piphus, supra*, 435 U.S. 247, 254-255 (1978). Such a prospect would render the Fourteenth Amendment a font of tort law, a prospect to be clearly avoided. *Paul v. Davis, supra*, 424 U.S. 693, 700-701 (1976).

Appellees submit that this case, however, does not include either the unquestioned constitutional right to life or a "right" of parenthood as neither of these rights were in any manner adversely affected at the time appellees released Thomas. Appellees submit the question of whether a particular defendant has acted in derogation of a constitutional right cognizable under § 1983 must be determined as of the point in time the defendant acted. The holding and underlying rationale of the Court in *Wood v. Strickland*, 420 U.S. 308, 322 (1975) clearly presupposes such an analysis:

> "To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permisible intentions, but also on *knowledge of the basic, unquestioned constitutional rights of his charges*. Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damage under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the *student affected*, or if

> he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are 'charged with predicting the future course of constitutional law.' *Pierson v. Ray*, 386 U.S., at 557. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of *the student's clearly established constitutional rights* that his action cannot reasonably be characterized as being in good faith." (Emphasis added.)

The opinion of the Court in *Wood* presupposes that the salutary purpose of the Civil Rights Act of deterence of repression of constitutionally protected rights is fairly served by insisting upon, *at the time a defendant acts*, (1) an ascertainable person or group of people subject to the defendant's conduct, and (2) knowledge, actual or constructive, of deprivation of a clearly established constitutional right. In virtually every § 1983 case decided by the Court actual or potential liability has been based upon a defendant acting vis-a-vis an identifiable person, or persons, often the subject of an official decision, and in contemplation of an ascertainable constitutional right of the person(s). *E.g., O'Connor v. Donaldson*, 422 U.S. 563, 576-577 (1975); *Scheuer v. Rhodes, supra*, 416 U.S. 232, 248-250 (1974). *See also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389, 390 (1971); *Monroe v. Pape, supra*, 365 U.S. 167, 169 (1961).

At the time the parole officials made their determination to release Thomas on parole no right of Mary Ellen Martinez or appellants cognizable under § 1983 was in any way infringed or

adversely affected. At the time of Thomas' parole neither appellants nor Mary Ellen Martinez was within the contemplation of the parole officials. It was not until approximately five months after Thomas' release that the parolee contacted the deceased in Tecolote Canyon, a time at which appellants concede there was no relationship between the state and the victim. Appellants' position presupposes that whenever loss of life occurs and there is a factual causal connection between conduct of a public official and the death there results a *constitutional* deprivation of life. This argument has already been rejected by the Court.[9/]

[9/] Such an attempt to transmute loss of life into a § 1983 action by virtue of official action involved in the causation chain has been rejected by the Court in *Paul v. Davis, supra*, 424 U.S. 693, 698-699 (1976):

> "If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that 'life' is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under § 1983.
>
> "It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent."

Appellants refusal to identify a constitutionally protected right under § 1983 infringed at the time the parole officials released Thomas cannot be mere inadvertence, but rather a tacit admission that no such right existed in favor of appellants or Mary Ellen Martinez. Appellants have not alleged Mary Ellen Martinez had a constitutional right, as a general member of the public, to be free from risk of injury inflicted by a parolee or free from any form of contact with parolees. Appellants have not argued they or Mary Ellen Martinez had a constitutional right to attend Thomas' parole hearing, present evidence, or argue against Thomas' release. Appellants have never taken the position these parole officials had a constitutional duty to appellants or Mary Ellen Martinez, as members of the public, to deny Thomas parole. Finally, appellants would apparently not claim a § 1983 violation had Thomas been released upon completion of a maximum sentence with the same result befalling Mary Ellen Martinez. In effect, however, as shown *infra*, under California's Determinate Sentencing Law, the Adult Authority's power was to determine sentence by virtue of granting parole.

Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care created by tort law. *Baker v. McCollan, supra,* ____ U.S. ____, 47 U.S.L.W. 4834 (1979). Appellees submit this case can be "parsed with relative ease" (*Id.*, at 4836) by appellants' failure to specifically identify any constitutional right allegedly infringed in this case.

B. Appellees Did Not Act Under Color Of State Law To Deprive Mary Ellen Martinez Or Appellants Of Any Right Cognizable Under 42 U.S.C. § 1983

The basic purpose of § 1983 is to allow redress for the deprivation of constitutional rights by any "person [acting] under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . . ."[10] *See Carey v. Piphus, supra,* 435 U.S. 247, 253-254 (1978); *Monroe v. Pape, surpa,* 365 U.S. 167, 187-192 (1960). State action or color of state law is essential to a § 1983 action. *Adickes v. Kress & Co.,* 398 U.S. 144 (1970); *Sykes v. State of California (Dept. of Motor Vehicles),* 497 F.2d 197, 200 (CA9 1974). Involvement of a private party in a conspiracy with a state official to deprive another of a constitutional right will also subject the private party to liability under § 1983. *United States v. Price,* 383 U.S. 787, 794 (1966). These parole officials, however, did not act to deprive appellants or Mary Ellen Martinez of any constitutional right cognizable under § 1983.[11] Nor is it alleged that appellees conspired in any fashion with Thomas, a private party, to take the life of Mary Ellen Martinez. Rather, the conduct which deprived Mary Ellen Martinez of her life was that of a private party, Thomas, who did not act in concert with or as an agent of appellees. Appellants' effort to transmute the violent private conduct of Thomas into state action must fail in the absence of

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[10] Appellants, although they have named the State of California as a defendant have correctly elected not to allege or argue that the State of California is liable under § 1983. *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 280 (1977); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Quern v. Jordan,* 47 U.S.L.W. 4241 (1979).

[11] See Part 1A of Brief of Appellees.

allegations of conspiracy or agency between appellees and Thomas. To condone such an attempt would enlarge the boundaries of § 1983 to encompass all acts of recidivistic crime committed by parolees or probationers.

II.

THE LEGAL HISTORY AND POLICY INTERESTS UNDERLYING 42 U.S.C. § 1983, THE IMMUNITY DOCTRINE, AND THE PAROLE SYSTEM, SUPPORT THE PRINCIPLE OF ABSOLUTE IMMUNITY FOR PAROLE OFFICIALS IN CONNECTION WITH A DETERMINATION TO PAROLE A PRISONER

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. . . . [P]urpose [of parole] is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison."[12] *Morrissey v. Brewer, supra,* 408 U.S. 471, 477 (1972).

As Mr. Chief Justice Burger recently observed in writing the opinion of the Court in *Greenholtz v. Nebraska Penal Inmates, supra,* ___ U.S. ___, 47 U.S.L.W. 4581, 4583 (1979):

> "Indeed the very institution of parole is still in an experiemental stage. In parole releases, like its

12/ See *Parole Revocation in the Federal System,* 56 Geo. L.J. 705 (1968).

> siblings probation release and institutional rehabilitation, few certaintities exist. In each case, the decision differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community. . . . This latter conclusion requires the Board to assess whether, in light of the nature of the crime, the inmate's release will minimize the gravity of the offense, weaken the deterrent impact on others and undermine respect for the administration of justice. The entire inquiry is, in a sense, an 'equity' type of judgment that cannot always be articulated in traditional findings." (Footnote omitted.)

The California Court of Appeal held below that parole officials serving this vital function as amplified above are immune from liability under § 1983. Analysis of "the immunity historically accorded the relevant official at common law and the interests behind it," *Imbler v. Pachtman, supra,* 424 U.S. 409, 421 (1976), demonstrates that the California Court of Appeal's decision is correct and should be affirmed.

A. The History Of The Immunity Docrine, And The Parole System, Support The Principle Of Absolute Immunity For Parole Officials In Connection With A Determination To Parole A Prisoner

It has long been the practice of the Court, in rendering decisions on § 1983 immunities, to enter into a considered inquiry into the immunity historically accorded the relevant official at common law and policy interests behind it. *Imbler v. Pachtman, surpa,* 424 U.S. 409, 421 (1976); *Butz v. Economou,* 438 U.S. 478, at 508.

The common law immunity of judges for acts committed in their judicial jurisdiction was found by the Court to be preserved in a § 1983 action in *Pierson v. Ray,* 386 U.S. 547, 554-555 (1967).[13/] This immunity had been accepted by the courts of this

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13/ The Court described the judicial immunity as follows:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher,* 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.' (*Scott v. Stansfield* L.R.3Ex. 220, 223 (1868), quoted in *Bradley v. Fisher, supra,* 349, note, at 350.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." 386 U.S. 547, 553-554.

country, including this Court, in the 18th and 19th centuries,[14/] and has been followed consistently through the present day. See *Butz v. Economou, supra,* 438 U.S. 478, 508-517 (1978) (immunity of administrative law judges); *accord, Stump v. Sparkman,* 435 U.S. 349 (1978).

A similar rationale has been employed by the courts in extending absolute immunity to prosecutors. From the close of the 19th Century, a majority of state courts held that prosecutors were absolutely immune from suits for malicious prosecution.[15/] This Court has consistently upheld the doctrine of absolute immunity for prosecutors. *Yaselli v. Goff,* 275 U.S. 503 (1927) (*Per Curiam*), *affirming* 12 F.2d 396 (CA2 1927). In *Imbler v. Pachtman, supra,* 424 U.S. 409 (1976), the Court extended the absolute immunity to a prosecutor sued under § 1983 and charged with knowing use of false testimony and suppression of evidence, basing its holding upon "the same considerations that underlie common-law immunities of judges. . . ." 424 U.S. at 422-423. As the Court in *Imbler* explained:

> "It is the *functional comparability* of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." 424 U.S. 409, at 423, n. 20. (Emphasis added.)

14/ See, *e.g., Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1872); *Yates v. Lansing,* 5 Johns. 282 (N.Y. 1810); *Ross v. Rittenhouse,* 2 Dall. 160 (Pa. 1792).

15/ For citation of early cases see *Imbler v. Pachtman, supra,* 424 U.S. at 422, n. 19.

Scrutiny of the functional nature of the activity under consideration in a § 1983 case has been an important element for the Court's determination of whether immunity will apply, especially where the complained of activity has been wholly or partially quasi-judicial in nature. *See, e.g., Imbler v. Pachtman, supra,* 424 U.S. at 430; *Butz v. Economou, supra,* 438 U.S. at 509, 511-513; *Lake Country Estates v. Tahoe Reg. Planning,* ___ U.S. ___, 47 U.S.L.W. 4256, 4260 (1979).

It has been the functional comparability of various judgments and activities to those of the judge which have prompted the courts to extend the quasi-judicial absolute immunity to other participants who fulfill an important governmental function in the judicial process, such as grand jurors,[16] court clerks,[17] court reporters,[18] and bar association members participating in disciplinary proceedings.[19]

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[16] See *Butz v. Economou, supra,* 438 U.S. at 509-511; *Imbler v. Pachtman, supra,* 424 U.S. at 423, n. 20; *Floyd v. Barker,* 12 Coke 23, 77 Eng. Rep. 1305 (1608); *Turpen v. Booth,* 56 Cal. 65 (1880); *Hunder v. Mathis,* 40 Ind. 356 (1872).

[17] *See e.g., Stewart v. Minnick,* 409 F.2d 826 (CA9 1969); *Rhodes v. Meyer,* 334 F.2d 709 (CA8 1964), *cert. denied,* 379 U.S. 915 (1964); *Pritt v. Johnson,* 264 F.Supp. 167 (M.D. Pa. 1967); *Ginsberg v. Stern,* 125 F.Supp. 596 (W.D. Pa. 1954), *aff'd.,* 225 F.2d 245 (CA3 1955). *Contra, McCray v. Maryland,* 456 F.2d 1 (CA4 1972) (ministerial functions).

[18] *See, e.g., Dieu v. Norton,* 411 F.2d 761 (CA7 1969); *Morrow v. Ingleburger,* 67 F.R.D. 675, 689 (S.D. Ohio 1974); *Brown v. Charles,* 309 F.Supp. 817, 817-818 (E.D. Wis. 1970); *United States ex rel. Johnson v. Specter,* 262 F.Supp. 113 (E.D. Pa. 1967).

[19] *See, e.g., Kissell v. Breskow,* 579 F.2d 425, 428-430 (CA7 1978); *Clark v. State of Washington,* 366 F.2d 678, 681 (CA9 1966); *Moity v. Louisiana State Bar Ass'n.,* 414 F.Supp. 180, 183-184, n. 17 (E.D. La. 1976), *aff'd.,* 537 F.2d 1141 (CA5 1976); *Kremer v. Stewart,* 378 F.Supp. 1195, 1197, 119 (E.D. Pa. 1974).

The parole decision, described by the Court in *Greenholtz v. Nebraska Penal Inmates, supra,* ___ U.S. ___, 47 U.S.L.W. 4581, 4585 (1979), as "much like a sentencing judge's choice," has been identified by the great majority of courts deciding the issue as another quasi-judicial function for which the quasi-judicial absolute immunity applies in a § 1983 action. *See also Gagnon v. Scarpelli,* 411 U.S. 778, 787-788 (1973). The Ninth Circuit has consistently held, in § 1983 actions brought by inmates, state parole officials perform quasi-judicial functions in processing applications for parole and approving parole work or probation and are absolutely immune from liability for damages under § 1983. *See Burkes v. Callion,* 433 F.2d 318 (CA9 1970), *cert. denied,* 403 U.S. 908; *Allison v. California Adult Authority,* 419 F.2d 822 (CA9 1969); *Villalobos v. Dickson,* 406 F.2d 835 (CA9 1969); *Silver v. Dickson,* 403 F.2d 642 (CA9 1968), *cert. denied,* 394 U.S. 990.

The Fourth Circuit has also held parole officials are absolutely immune from liability in a § 1983 action for a decision regarding parole status. *Douglas v. Muncy,* 570 F.2d 499 (CA4 1978);[20] *Pope v. Chew,* 521 F.2d 400 (CA4 1975), as has the Third Circuit, *Thompson v. Burke,* 556 F.2d 231 (CA3 1977), the Fifth Circuit, *Johnson v. Wells,* 566 F.2d 1016 (CA5 1978), *Cruz v. Skelton,* 502 F.2d 1101 (CA5 1974), the Sixth Circuit, *Joyce v. Gilligan,* 383 F.Supp. 1028 (N.D. Ohio 1974), *affirmed without opinion,* 510 F.2d 973 (CA6 1975) and numerous federal district courts. *Garvey v. Casson,* 423 F.Supp. 68 (D.C.

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[20] *Douglas v. Muncy* also held a parole officer who allegedly arbitrarily enforces conditions of parole is likewise immune. 570 F.2d at 501.

Del. 1976); *Bricker v. Michigan Parole Bd.*, 405 F.Supp. 1340 (E.D. Mich. 1975); *Reiff v. Commonwealth of Pennsylvania*, 397 F.Supp. 345 (E.D. Pa. 1975);[21] *Fitzgerald v. Procunier*, 393 F.Supp. 335 (N.D. Cal. 1975); *Myers v. Bendus*, 343 F.Supp. 370 (E.D. Pa. 1971); *United States ex rel. Pope v. Williams*, 326 F.Supp. 279 (E.D. Pa. 1971); *Brown v. State of Pennsylvania, etc.*, 311 F.Supp. 1176 (E.D. Pa. 1970); *Robinson v. Largent*, 311 F.Supp. 1032 (E.D. Pa. 1970); *Paige v. Pennsylvania Board of Parole*, 311 F.Supp. 940 (E.D. Pa. 1970).

Rather than tendering for the Court's consideration any analysis of the judicial history of the quasi-judicial immunity for parole decisions of parole officials from § 1983 liability, appellants and Amicus, Americans For Effective Law Enforcement,[22] cite two cases (*Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977), and *Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121 (CA4 1976), *cert. denied*, 429 U.S. 827 (1977)), which are of little consequence to the issue of absolute immunity for a parole official from § 1983 liability for a determination to release an inmate on parole.

In *Grimm*, the surviving parents of a man killed by a released parolee brought a wrongful death action[23] against Arizona

[21] *Reiff v. Commonwealth of Pennsylvania* also holds a parole officer is immune from § 1983 liability for discretionary activity. 397 F.Supp. at 348.

[22] *See* Brief of Appellants, pp. 12-13, 33-35; Brief, Amicus Curiae, of Americans For Effective Law Enforcement, Inc., pp. 6-14.

[23] Two other plaintiffs joined in the action for personal injuries sustained by the hand of the parolee.

parole officials who had released the parolee, alleging grossly negligent and reckless release. The action was based upon Arizona law, and did not include any claim under § 1983. The majority of the Arizona Supreme Court, in a three-two split, selected this case as a vehicle to abolish the Arizona judicially created doctrine of absolute immunity for the discretionary activities of administrative officials. (564 P.2d at 1233.) In reaching its holding that members of the State Board of Pardons and Paroles owed a duty to the general public to avoid grossly negligent or reckless release of a highly dangerous prisoner (564 P.2d at 1234), the *Grimm* majority engaged in an attack against "[t]he authority wielded by so-called faceless bureaucrats . . ." (564 P.2d at 1233), totally ignored the consensus and wisdom of the courts of this country that the decision to release an inmate on parole is a quasi-judicial function for which absolute immunity attaches, and decided the immunity question not on the basis of the functional nature of the decision to parole, but in reaction to the power of a parole official being reposed in the administrative branch of government.[24]

It comes as no surprise, therefore, that the majority opinion in *Grimm* is mocked by the dissent,[25] expressly rejected by the

[24] Thus the "functional comparability" approach preferred by the Court (*Imbler v. Pachtman, supra*, 424 U.S. at 422-423, 430; *Butz v. Economou, supra*, 438 U.S. at 509, 511-513) is spurned.

[25] "Beware, oh unsuspecting trial judge, that when your decision to place a felon on probation goes horribly awry, the majority of my brothers sitting in cloistered ivory tower call your action gross and subject you to the consequences thereof. I hasten to concede that the majority opinion does not say this but logic tells

(Footnote 25 continued on page 30.)

Supreme Court of Minnesota (*Papenhausen v. Schoen*, ___ Minn. ___, 268 N.W.2d 565 (1978)), and has not been followed in § 1983 cases brought by members of the general public against parole officials for death or injury inflicted by a released parolee. *Pate v. Alabama Bd. of Pardons and Paroles*, 409 F.Supp. 478 (M.D. Ala. 1976), *aff'd without opinion*, 548 F.2d 354 (CA5 1977); *Reiff v. Commonwealth of Pennsylvania, supra*, 397 F.Supp. 345 (E.D. Pa. 1975).

In *Papenhausen v. Schoen, supra*, ___ Minn. ___, 268 N.W.2d 565 (1978), members of the parole board of Minnesota granted one Dion a "medical parole" from a penal institution where he had been incarcerated to an "open hospital" providing freedom of movement. Dion "escaped" from the open facility and assaulted and raped plaintiffs' daughter. Plaintiffs alleged Dion had been 'unlawfully, carelessly, unreasonably, negligently or . . . intentionally transferred from the reformatory to the state hospital." (268 N.W.2d at 567.) In a unanimous opinion of the Minnesota Supreme Court, the result in *Grimm v. Arizona Bd. of Pardons & Paroles, supra*, 115 Ariz. 260, 564 P.2d 1227 (1977), was expressly rejected:

> "In this case, the defendant parole board members argue that the nature of their duties epitomizes a discretionary governmental

(Footnote 25 continued)

me that the discretionary acts of the parole board need no less protection than those of the sentencing judge. There may be boards or commissions, bastions of bureaucracy, which should not be accorded the protection of quasi-judicial immunity, but the parole board is hardly one of these." (564 P.2d at 1237.)

> activity. We agree. The performance of their duties requires each member of the board to personally evaluate a body of data and make a discretionary judgment based on that evaluation. . . . Similarly, we find it impossible to term Dr. Romero's position 'ministerial' under the foregoing definitions. As the medical chief of the Vail unit at the state hospital, Dr. Romero was charged with the responsibility for evaluating the patients' problems and treatment. The selection and monitoring of treatment programs, based on the personal examination of patients and their files, is in our opinion an indisputably discretionary activity, involving as it does the application of skilled judgment to a wide variety of human conditions. See, *Linder v. Foster*, 209 Minn. 43, 295 N.W. 299 (1940). We are thus unpersuaded by plaintiffs' suggestion that the activities of these defendants were merely ministerial and not protected by the doctrine of discretionary immunity.
>
> ". . . .
>
> "Plaintiffs next urge us to follow the lead of the Arizona Supreme Court in *Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).
>
> "While it may be that the standard of care enunciated in *Grimm* is not unduly burdensome for public officials, we find it unnecessary to resolve that question in this case. Even if this court were to impose a more stringent standard of care on discretionary officials, the outcome of the present case would be unaffected. There is nothing in the record before us to indicate that

these defendants were negligent, let alone reckless. From the uncontroverted affidavits, it appears that Dion was friendly, eager to cooperate, and manifested no signs of dangerous propensities. Accordingly, we decline to judicially expand the tort liability of public servants as did the Arizona court." 268 N.W.2d at 571-573. (Footnote omitted.)

In *Reiff v. Commonwealth of Pennsylvania, supra,* 397 F.Supp. 345 (E.D. Pa. 1975), a minor and her parents all brought § 1983 actions against, *inter alia,* Pennsylvania parole board members alleging negligent release and supervision of a parolee with known dangerous propensities who shot and injured the minor plaintiff during the course of a robbery. The court applied the absolute quasi-judicial immunity to bar liability on the part of the parole officials and a parole officer:

"The complaint as amended against the individual defendants must be dismissed. The complaint as amended seeks damages from them based upon discretionary acts within their official capacities. Defendants Boor, Butler, Conley, Jefferson, Burke, Tartler and Miller are members and officials of the Pennsylvania Board of Probation and Parole and, as such, they are immune from suit for damage under § 1983 when, as in this case, it is alleged that they acted within the scope of their authority and in their official capacities. The law is clear that such officials are immune from suit for damages under § 1983 in the performance of discretionary duties within the framework of a quasi-judicial process. [Citations omitted.]

"Similarly, defendant Carol Attwood is immune from suit for damages under § 1983 since it is alleged that she acted within the scope of her authority and in her official capacity thereby acting as a parole officer performing discretionary duties within the framework of a quasi-judicial process. [Citations omitted.]" 397 F.Supp. at 348.

Pate v. Alabama Bd. of Pardons and Paroles, supra, 409 F.Supp. 478 (M.D. Ala. 1976), *aff'd without opinion,* 548 F.2d 354 (CA5 1977), involved facts similar to this case. Plaintiff's minor daughter was raped and killed by an Alabama parolee. Plaintiff brought a § 1983 action against members of the parole board alleging negligence, and reckless wilfullness and wantonness in connection with the release of the parolee and subsequent supervision. The court rendered the following analysis and holding:

"The complaint herein alleges, not only negligence but also, reckless willfulness and wantonness. There is dictum in some lower court cases that an allegation of bad faith, coupled with a substantial showing thereof, might strip parole officials of their immunity for acts committed in the course of their duties. *Joyce v. Gilligan,* 383 F.Supp. 1028 (ND Ohio, 1974), affm'd. without opinion 510 F.2d (6th Cir. 1975). Upon consideration of the reasons supporting immunity, however, this Court concludes that parole officials should be protected by the same absolute immunity afforded judges for acts resulting from the performance of their official duties.

"Parole officials bear a more than ordinary responsibility because of the dangerous traits already demonstrated by those with whom they must deal. This responsibility imposes far greater moral burdens and requires far more difficult legal choices than those met by the average administrative officer. The function of the Parole Board is more nearly akin to that of a judge in imposing sentence and granting or denying probation than it is to that of an executive administration of criminal justice that those who determine whether an individual shall remain incarcerated or be set free should do so without concern over possible personal liability at law for such criminal acts as some parolee will inevitably commit; in other words, that such officials should be able to exercise independent judgment without pressure of personal liability for acts of the subject of their deliberations. . . .

"It is the judgment of this Court that Defendants Robinson, Ussery, Lambert and the Board of Pardons and Paroles are absolutely immune from suit for damages under 42 U.S.C. § 1983. The Court would note the recent decision of the United States Supreme Court, extending such absolute immunity even to public prosecutors, *Imbler v. Pachtman*, ____ U.S. ____, 96 S.Ct. 984, 47 L.Ed.2d 128, 44 U.S. Law Week 4250 (1976), as evidencing support for the general line of reasoning herein adopted." (409 F.Supp. at 479.) (Footnote omitted.)

Amicus Americans For Effective Law Enforcement, in support of appellants, cite *Semler v. Psychiatric Institute of Washington, D.C., supra*, 538 F.2d 121 (CA4 1976) as laying

down the "proper guidelines"[26] for this case.[27] In *Semler* the parents of a girl killed by a probationer brought a negligence action bsed on Virginia common law against a psychiatric institute which had charge of the probationer pursuant to court order, a treating physician, a professional group of psychiatrists, and a Virginia probation officer who was involved with the release of the probationer from the type of confinement ordered by the court without the judge approving the probationer's change in status or being notified of the change. The court, relying on general principles of tort law, held that, although Virginia law would bar liability for the probation officer's discretionary acts, the complained of conduct was ministerial in nature, negligent, and not entitled to immunity. (538 F.2d at 127.)

Semler did not: (1) involve a § 1983 action; (2) place in issue the quasi-judicial decision of probation and terms thereof; (3) abolish or modify the Virginia common law immunity applicable for the discretionary activities of a probation officer; or (4) in any manner modify or even question the Fourth Circuit's acceptance of absolute quasi-judicial immunity from § 1983

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[26] Brief, Amicus Curiae, of Americans For Effective Law Enforcement, Inc., In Support of Appellants, p. 10.

[27] *Semler*, inapposite to the issues of this case, has not even been cited by appellants.

liability for a parole official's decision regarding parole status.[28] [29]

The short judicial history set forth above has been rather consistent in upholding an absolute quasi-judicial immunity from § 1983 liability for a parole official's determination to release a prisoner. It must now be analyzed whether "consideration of public policy . . . likewise countenances absolute immunity under § 1983." *Imbler v. Pachtman, supra,* 424 U.S. at 424.

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[28] *Douglas v. Muncy, supra,* 570 F.2d 499 (CA4 1978); *Pope v. Chew, supra,* 521 F.2d 400 (CA4 1975).

[29] *Semler's* irrelevance is further underscored by the fact that appellants (1) elected not to sue any parole agent of Thomas under § 1983 for alleged negligence in connection with ministerial aspects of supervision, and (2) devote no part of that portion of their brief dealing with § 1983 liability to any issue other than whether a parole official's reckless or grossly negligent release of a parolee triggers § 1983 liability. Nevertheless, because the gist of appellants' § 1983 claim is, when stripped of conclusionary pleading, simple negligence based on alleged poor judgment in Thomas' release, and inasmuch as appellants have technically incorporated by reference into their § 1983 claim (fifth cause of action) allegations of negligent parole supervision of their third cause of action, appellees will analyze, *infra,* the issue of whether simple negligence can give rise to § 1983 liability, a question appellees believe is "fairly comprised" within the issues tendered for the Court's consideration. This Court's Rule 23(1)(c).

B. The Policy Interests Underlying 42 U.S.C. § 1983, The Immunity Doctrine, And The Parole System, Support The Principle Of Absolute Immunity For Parole Officials In Connection With A Determination To Parole A Prisoner

In addition to the judicial precedents discussed above, strong policy interests support the absolute immunity doctrine which the courts have recognized for parole officials' decisions with respect to parole status. While parole officials perform different functions than do judges and prosecutors, just as judges and prosecutors themselves have different responsibilities, similar policies support the principle of absolute immunity for each of these government-sponsored participants in our criminal-penological justice system.

1. The California Parole System At The Time Of Thomas' Parole

A state may establish a system of parole although it has no duty to do so. *Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581, at 4583. The parole system may be flexible in defining conditions of release and factors to be considered by the parole authority to insure the "public interest purposes of rehabilitation and deterrence, . . ."[30] Generally, parole statutes vest "very broad discretion in [a parole board] . . ." (*Id.,* at 4583), in the hope that, "The objective of rehabilitating

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[30] *See Greenholtz,* at 4853. *See also* A. von Hirsch & K. Hanrahan, *Abolish Parole?* (1978); N. Morris, *The Future of Imprisonment* 47 (1974); J. Wilson, *Thinking About Crime* 171 (1975); D. Stanley, *Prisoners Among Us* 59, 76 (1976); Dawson, *The Decison to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 Wash. U.L.Q. 243, 249.

convicted persons to be useful, law-abiding members of society can remain a goal no matter how disappointing the progress." *Id.*, at 4584.

At the time of Thomas' release on parole in 1975, California endeavored to meet the challenges and purposes of parole, enumerated above, pursuant to the command of the Indeterminate Sentence Law,[31]/ California Penal Code section 1168, which then provided in relevant part:

> "Every person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment. [ ] . . ."

Responsibility for determining the actual length of time for the statutory maxima and minima (Former California Penal Code section 3023)[32]/ the convicted person was to serve in prison and/or on parole was vested in the California Adult Authority (Former California Penal Code section 5075),[33]/ which could

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31/ In 1977 California adopted a Determinate Sentencing Law (Cal. Pen. Code §§ 1170-1170.6) reducing discretion of parole officials to determine parole eligibility.

32/ Former California Penal Code section 3023:

"The term of imprisonment shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted."

33/ *See* footnote 3, *supra*.

"determine and redetermine, after the commencement of imprisonment, what length of time, if any, such person shall be confined" (Former California Penal Code section 3020),[34]/ and which had "the power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and inclosures." (Former California Penal Code section 3040.)[35]/ A practice evolved in which "customarily a term [was] fixed only in conjunction with a grant of parole."[36]/

The California Supreme Court clearly enunciated the principles, purposes, and objects of the California Parole system in effect at the time of Thomas' parole in *In re Minnis*, 7 Cal.3d 639, 644-645, 102 Cal.Rptr. 749, 498 P.2d 997 (1972):

> "This court has explained that 'the purpose of the *indeterminate sentence law*, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment

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34/ Former California Penal Code section 3020:

"In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this code, the Adult Authority may determine and redetermine, after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State."

35/ Former California Penal Code section 3040:

"The Adult Authority shall have the power to allow prisoners imprisoned in the state prisons to go upon parole outside the prison walls and inclosures. The authority may parole prisoners in the state prisons to camps for paroled prisoners established under Article 5, Chapter 5, Title 1, Part 3 of this code."

36/ *In re Rodriguez*, 14 Cal.3d 639, 646, 122 Cal.Rptr. 552, 537 P.2d 384 (1975).

which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing.' (*In re Lee* (1918) 177 Cal. 690, 692 [171 P. 958]; italics added. See also *Williams v. New York* (1949) 337 U.S. 241, 247-248 [93 L.Ed. 1337, 1342-1343, 69 S.Ct. 1079].) 'In the general field of criminal law the Legislature has abandoned the ancient notion of categorical punishment, the infliction of fixed terms for certain crimes, and substituted the indeterminate sentence, leaving to the Adult Authority the judgment of the period of incarceration. *The Authority does not fix that period pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual* analyzed as a human composite of intellectual, emotional and genetic factors.' (*People v. Morse* (1964) 60 Cal.2d 631, 642-643 [36 Cal.Rptr. 201, 388 P.2d 33, 12 A.L.R.3d 810]; italics added; fns. omitted.)

"We have similarly stated that '[t]he purpose and object of a *parole system* is to mitigate the rigor of the old [penitentiary system] and . . . to provide a more humane management and prison discipline under which there is extended to those who may show a disposition to reform and whose reformation may reasonably be expected, a hope and prospect of liberation from the prison walls under the restrictions and

conditions of a parole. . . . [T]he interests of society require that under prison discipline every effort should be made to produce a reformation of the prisoner. . . . The legislative policy [was to provide a system whereby] a hope was to be held out to prisoners that through good conduct in prison and a disposition shown toward reformation, they might be permitted a conditional liberty upon restraint under which they might be restored again to society. . . ." (*Roberts v. Duffy* (1914) 167 Cal. 629, 634 [140 P. 260]; italics added; see also *People v. Morse, supra,* 60 Cal.2d 631, 642-643, fn. 9; *People v. Denne* (1956) 141 Cal.App.2d 499, 507-508 [297 P.2d 451].) The goals of the parole system can best be achieved by 'the liberation of a prisoner on parole at the earliest period when permitted by law and when *on a consideration of the merits of each individual case,* parole ought, in the judgment of the board, to be granted.' (*Roberts v. Duffy, supra,* at p. 637; italics added.)

"Many factors are to be considered by the Authority in deciding whether to fix a sentence at less than maximum and whether to grant parole. Although 'good conduct while incarcerated and potential for reform are not the only relevant factors, . . . this court has acknowledged their significance. (*In re Schoengarth* (1967) 66 Cal.2d 295, 300 [57 Cal.Rptr. 600, 425 P.2d 200]; *Roberts v. Duffy, supra,* 167 Cal. 629, 640.) Furthermore, the Authority has declared that these factors are among those of 'paramount importance.' (Cal. Adult Authority, Principles, Policies and Program (1952) pp. 8-9; see also Adult

Authority Policy Statement No. 11 (June 27, 1966).) Any official or board vested with discretion is under an obligation to consider *all* relevant factors (cf. *People v. Wade* (1959) 53 Cal.2d 322, 338-339 [1 Cal.Rptr. 683, 348 P.2d 116]), and the Authority cannot, consistently with its obligation, ignore postconviction factors unless directed to do so by the Legislature." (Footnote omitted.)

2. The Unique Status Of Parole Officials In The Criminal-Penological System Justifies Absolute Quasi-Judicial Immunity

The recognition by the court decisions, cited in Part IIA of the Brief of Appellees, that absolute immunity applies to parole officials has explicitly rested, in large measure, on the policies and interests supporting absolute immunity from § 1983 liability for judges and prosecutors.

The Court, in *Imbler v. Pachtman, supra,* 424 U.S. 409, 427 (1976), expanded the absolute immunity of judges from § 1983 liability recognized in *Pierson v. Ray, supra,* 386 U.S. 547, 554-555 (1967), to prosecutors, an immunity the prosecutor had already enjoyed at common law. A number of important policy considerations support the holding of *Imbler,* including the recognition that § 1983 liability would have a chilling effect on the decision-making aspect of the prosecutorial function in our criminal justice system. *Id.,* at 425. Parole officials also play a vital quasi-judicial role in our criminal-penological system of justice. *Greenholtz v. Nebraska Penal Inmates, supra,* ____ U.S. ____, 47 U.S.L.W. 4581, 4583 (1979); *Gagnon v. Scarpelli, supra,* 411 U.S. 778, 787-788. The very function of the parole

official in the criminal-penological system "often invites a common-law tort action." *Imbler v. Pachtman, supra,* 424 U.S. at 421. As the Court has held with respect to judges and prosecutors, the intense feelings and significant interests at stake in a criminal trial are likely to produce a losing party who will "accept anything but the soundness of the decision as explanation" of the outcome. *Butz v. Economou, supra,* 438 U.S. at 509; *Bradley v. Fisher, supra,* 80 U.S. at 348. Just as the role of the prosecutor is likely to produce "with some frequency retaliatory suits by angry defendants," *Butz, supra,* 438 U.S. at 510, so the wrath, loss and emotion of victims[37] of recidivistic crime may easily be converted into the ascription of reckless and improper actions to the parole official.[38]

As in the present case, unsupported allegations of malicious, reckless, and grossly negligent release are easily leveled against parole officials, and, in the absence of absolute immunity which would defeat such a suit at the outset, could be disproven only by evidentiary trial which would entail inquiry into the circumstances and motivations of the parole officials' actions. *Imbler v. Pachtman, supra,* 409 U.S. at 419, n. 13. *See also Scheuer v. Rhodes, supra,* 416 U.S. 232, 238-239; *Wood v. Strickland,*

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[37] Including heirs of persons victimized by homicide committed by parolees.

[38] With due respect to appellants' tragic loss, appellees submit there is no greater evidence of the emotional nature of § 1983 suits against parole officials than appellants' embellishment of facts in their Statement Of The Case and their reference to Thomas as an "assassin." (A. 24.)

supra, 420 U.S. 308, 320-322 (1975).[39]/ Any such trial, in the absence of absolute immunity, would, as in the case of the prosecutor, involve, "[d]efending these decisions, often years after they were made, [and] could impose unique and intolerable burdens. . . ." upon a parole official responsible annually for hundreds of paroles.[40]/ *Imbler v. Pachtman, supra*, at 425-426; cf. *Bradley v. Fisher, supra*, 13 Wall., at 348; *Pierson v. Ray, supra*, 386 U.S. at 554.

Imbler v. Pachtman, supra at 425, recognized that § 1983 suits surviving the pleadings would subject honest prosecutors

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[39]/ The prospect of such an unwarranted trial calls into play the admonition contained in the concurring and dissenting opinion of Mr. Justice Rehnquist in *Butz v. Economou, supra*, 438 U.S. at 522:

> "But if we allow a mere allegation of unconstitutionality, obviously unproved at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The ease with which a constitutinal claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his actions on the merits. The result can only be damage to the 'interests of the people,' *Spalding, supra*, at 498, which 'require[s] that due protection be accorded to [Cabinet officials] in respect to their official acts."

[40]/ Every year in California, over 13,000 persons are released from prisons and jails on parole. Additionally, 152,242 adults and 55,859 juveniles were on probation by the end of 1976 statewide. *Future of Probation Project Report*, Foundation for Continuing Education in Corrections (January 12, 1979).

to difficult lawsuits wherein resolution of technical issues relating to evidence and strategy would be by lay jury determination. As the Court avoided such a prospect for the prosecutor, the prospect of a lay jury determining issues such as motivations and circumstances surrounding a parole official's decision to release a parolee, psychiatric indications and contra-indications for parole of a prisoner, predictive capabilities of anti-social behavior of a prisoner, conduct and character traits of a prisoner, etc., is also to be avoided, especially given the possible temptation for juries to "reduce" crime by applying pressure on the parole system in the form of liability verdicts against parole officials.

The Court has questioned the wisdom of permitting the courts, and presumably juries, to handle certain types of questions raised by § 1983 litigation and immunity. See *Butz v. Economou, supra*, 438 U.S. at 503. It would appear that the judicial and legislative branches have already delegated the parole aspect of the penological process to parole officials trained in the disciplines most intimately involved with parole. As the Court has pointed out, "No ideal, error-free way to make parole release decisions has been developed; the whole question has been and will continue to be the subject of experimentations involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decision makers in predicting future behavior." *Greenholtz v. Nebraska Penal Inmates, supra*, 47 U.S.L.W. 4581, 4584. Even though the parole decision is "predictive and discretionary," *Morrissey v. Brewer, supra*, 408 U.S. at 480, courts and commentators have acknowledged that the predictive capabilities of future behavior, including violence,

both within and without the context of parole, are limited.[41] As Justice Douglas cogently stated:

> "Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their

[41] *Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581, 4584. A representative sample of the copious outpouring of articles by psychiatrists and psychologists on these topics would include: Diamond, *The Psychiatric Prediction f Dangerousness* (1975) 123 U.Pa.L.Rev. 439; Monahan, *The Prevention of Violence, in Community Mental Health and the Criminal Justice System* (Monahan edit. 1975). Stead & Cocozza, *We Can't Predict Who is Dangerous* (1975) 8 Psych. Today 32; Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry* (1973) 1 J. Psychiatry & L. 409; Rubin, *Prediction of Dangerousness in Mentally Ill Criminals* (1972) 27 Archives of Gen. Psychiatry 397; Wenk, Robison & Smith, *Can Violence be Predicted?* (1972) 18 Crime. & Del. 393.

The principal recent articles in this field by legal writers, reporting generally on the foregoing studies and their juridical implications, are: Ennis & Litwack, *Psychiatry, and the Presumption of Expertise: Flipping Coins in the Courtroom,* (1974) 62 Cal. L.Rev. 693 at pp. 711-734; von Hirsch, *Prediction of Criminal Conduct and Preventative Confinement of Convicted Persons* (1971) 21 Buffalo L. Rev. 717; Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions* (1970) 23 J. Legal Ed. 24, 42-47; Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways* (1968) 4 Trial 29; Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment* (1968) 117 U.Pa.L.Rev. 75, 81-85; *Developments In The Law--Civil Commitment of the Mentally Ill* (1974) 87 Harv. L.Rev. 1190, 1240-1245.

> predictions than other professionals."[42] *Murel v. Baltimore City Criminal Court,* 407 U.S. 355, 364-365, fn. 2 (1972).

[42] "Justice Douglas' quotation is from testimony of Bruce J. Ennis, staff attorney of the New York Civil Liberties Union, given before the Subcommittee on Constitutional Rights of the United States Senate Committee on the Judiciary. Mr. Ennis is an experienced practitioner in the field of psychiatry and the law, and has authored such works as Legal Rights of the Mentally Handicapped (1973), Rights of Mental Patients (1973), and Prisoners of Psychiatry: Mental Patients, Psychiatrists, and the Law (1972). In the latter book Mr. Ennis states (at p. 227), 'In a well-known New York study, psychiatrists predicted that 989 persons were so dangerous that they could not be kept even in civil mental hospitals, but would have to be kept in maximum security hospitals run by the Department of Corrections. Then, because of a United States Supreme Court decision [Baxstrom v. Herold (1966) 383 U.S. 107], those persons were transferred to civil hospitals. After a year, the Department of Mental Hygiene reported that one-fifth of them had been discharged to the community, and over half had agreed to remain as voluntary patients. During the year, only 7 of the 989 committed or threatened any act that was sufficiently dangerous to require retransfer to the maximum security hospital. Seven correct predictions out of almost a thousand is not a very impressive record.

"'Other studies, and there are many, have reached the same conclusion: psychiatrists simply cannot predict dangerous behavior. They are wrong more often than they are right. And they always err by overpredicting dangerous behavior.'

"A number of reports on the consequences of the *Baxstrom* experience have been published, e.g., by Henry J. Steadman of the New York State Department of Mental Hygiene. Although the figures vary somewhat according to the duration of the post-release period considered, the overall results remain constant: only a very small proportion of the allegedly dangerous patients committed subsequent acts of violence." *See People v. Burnick,* 14 Cal.3d 306, 328, fn. 18; 121 Cal.Rptr. 488, 535 P.2d 352 (1975).

To permit juries to decide whether parole releases are made recklessly or in gross negligence, hopeless standards as shown above, given (1) the impossible task of predicting future violence and (2) "the recognition that with many [parolees] there is a risk that they will not be able to live in society without committing additional anti-social acts," (*Morrissey, supra,* 408 U.S. 471, 483 (1972)), will toll the beginning of the end of the parole system. As the Court admonished in *Greenholtz v. Nebraska Penal Inmates,* ___ U.S. ___, 47 U.S.L.W. 4581, 4585: "If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole."

Qualified immunity for a parole official would have drastic consequences upon the potential of deserving inmates to obtain release on parole. The Court has observed that qualified immunity for a prosecutor in § 1983 suits "would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution." *Imbler v. Pachtman, supra,* 424 U.S. at 424. Appellees submit that, likewise, qualified immunity for a parole official would undermine performance of his duties no less than would the threat of common-law suits for negligence. *Imbler,* at 426, fn. 24, recognized that qualified immunity for a prosecutor makes him "reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages." Similarly, qualified immunity for a parole official would have a chilling effect on parole decisions in close cases and in cases where the prospective parolee had been incarcerated for a sex offense or other crime of violence.

The Court has observed:

> "And society has a further interest in treating the parolee with basic fairness: fair treatment in parole [decisions] will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." (*Morrissey v. Brewer, supra,* 408 U.S. 471, at 484.)

In addition to the prejudice qualified immunity[43] would inflict upon parole officials and penal inmates, society generally

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[43] Although the precedents and policy arguments reviewed require a rule of absolute immunity for parole officials' determinations to grant parole, affirmance of the decision below would be appropriate here even under a qualified immunity rule. The Court has held that even where absolute immunity may be inappropriate, qualified immunity should be granted a number of different types of officials. See, *e.g., Scheuer v. Rhodes, supra,* 416 U.S. 232, at 240; *Butz v. Economou, supra,* 438 U.S. 478, at 497; *Wood v. Strickland, supra,* 420 U.S. 308. Appellants at least concede parole officials are entitled to qualified immunity, and the rulings of these cases are at least equally applicable to parole officials, since the threat of liability would significantly interfere with their willingness and ability to perform their crucial public functions, "with the decisiveness and the judgment required by the public good." *Scheuer, supra,* at 240. Immunity from liability for "good-faith, nonmalicious action taken to fulfill their official duties" is thus justified for parole officials. *Wood, supra,* at 318.

In this case, it is clear that even such qualified immunity would require dismissal of appellants' complaint. As the California Court of Appeal indicated, there were no factual allegations of malice in the complaint, only unsupported conclusionary ascriptions to appellees of malice. It would be absurd to suggest that appellees intended death or injury to a member of the public upon the release of Thomas, or that they knew such would occur. Appellants do not allege such even

(Footnote 43 continued on page 50.)

would be disserved by withholding absolute immunity. It is clear that parole has become an integral part of our criminal-penological justice system:

> "Government statistics reveal that substantially less than one-third of all first-time federal offenders are held in prison until mandatory release. . . . In addition, 88% of the judges responding to a recent survey stated that they considered the availability of parole when imposing sentence, and 47% acknowledged their expectation that defendants would be released on parole when imposing sentence, and 47% acknowledged their expectation that defendants would be released on parole after serving one-third of their sentences. . . . In accord with these views, the Administrative Conference of the United States has advised Congress that courts set maximum sentences anticipating 'that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum term or anything approaching the maximum.' . . . And in discussing the sentencing provisions of the proposed revision of the federal criminal

(Footnote 43 continued)

though they had two opportunities to do so. Further, neither Mary Ellen Martinez nor appellants were the "charges" of appellees when Thomas was released, and it is clear, the parole officials had knowledge of any adverse affect on "unquestioned constitutional rights" of these people at such time. *Wood, supra,* at 322. Given that no clearly established constitutional rights have even been identified by the Court for a member of the general public arising out of a decision to grant an inmate parole, appellees are not liable under § 1983. *Procunier v. Navarette,* 434 U.S. 555, 565-566 (1978).

> code, S. 1437, the Senate Judiciary Committee observed:
>
> "'A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one third of the sentence.' S. Rep. No. 95-605, 95th Cong., 1st. Sess., 1169.
>
> "Thus, experience in the federal system has led both judges and legislators to expect that inmates will be paroled substantially before their sentences expire. Insofar as it is critical under the Court's due process analysis, this understanding would certainly justify a similar expectation on the part of the federal inmates." (Dissent of Mr. Justice Marshall, *Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581 (1979). (Footnotes omitted.)

As the Court observed in *Morrissey v. Brewer, supra,* 408 U.S. 471, at 484:

> "The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law."

The interests of parole officials,[44/] inmates, and society will best be served by affording absolute immunity to parole

[44/] To the extent liability of parole officers under § 1983 has been tendered to the court by the allegations in the complaint, even though the question is not addressed by appellants in their Brief, it is clear that due to the relationship between a parole officer and a parolee, absolute

(Footnote 44 continued on page 52.)

officials in § 1983 suits for determinations to grant parole. The underlying rationale for this immunity was never more eloquently articulated than by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949):

> "The justification for [immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen

(Footnote 44 continued)

immunity is required. In *Gagnon v. Scarpelli, supra,* 411 U.S. 778, at 783-786, the Court recognized the duty of the parole officer to the welfare of his client, the parolee, and the parole officer's function "to supervise a course of rehabilitation," for which, "[the parole officer] has been entrusted traditionally with broad discretion. . . ." The Court also recognized that if the parole officer's purpose was converted into a prosecutor, "his role as counsellor to the probationer or parolee is then surely compromised." The Court in *Morrissey v. Brewer, supra,* 408 U.S. at 478-479, recognized that "The parole officers are part of the administrative system designed to assist parolees and to offer them guidance." To impose § 1983 liability on parole officers for the acts of recidivism of their charges would result in transforming the process of counselling and assistance to an enforcement and prosecutorial function. The process of rehabilitation would surely be subverted by such liability.

Finally, appellants apparently accept the wisdom of applying the same type of § 1983 liability analysis to a determination not to revoke parole as that which exists for the original determination to release an inmate on parole. The Court has recognized the overlapping characteristics which inhere in both decisions. *E.g., Greenholtz v. Nebraska Penal Inmates, supra,* 47 U.S.L.W. 4581, at 4583

> the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . ."

3. Available Alternatives To 42 U.S.C. § 1983 Liability Of Parole Officials

In addition to the historical and policy arguments discussed above, the availability of alternative means to help ensure the integrity of the parole decision process support the doctrine of absolute immunity for parole officials. *See Imbler v. Pachtman, supra,* 424 U.S. at 427 (discussing alternatives to § 1983 liability of prosecutor).

If the claim be that a particular system of parole vests excessive discretionary authority in parole officials to fix parole dates and/or determine durations of sentence, it is within the power of a legislative body to reduce the discretion of parole

officials much as California did in 1977 when it adopted the Determinate Sentencing Law (California Penal Code sections 1170-1170.6). Such an alternative permits individual states to experiment with the rehabilitative process and achieve a balance between the goals of prisoner rehabilitation and the protection of society. Such an alternative is clearly superior to the imposition of § 1983 liability upon parole officials for recidivistic crime committed by parolees. Next, it is certainly within the discretion of a state to permit the court, prosecutor, defense counsel, and law enforcement agencies that investigated a particular case to file statements of their views of the inmate with the parole body. In fact, this was the case in California, by virtue of Penal Code section 1203.01,[45] in the form in which it

[45] California Penal Code section 1203.01 provided prior to its 1977 amendment:

> "Immediately after judgment has been pronounced, the judge and the district attorney, respectively, shall cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with such reports as the probation officer may have made relative to the prisoner. The attorney for the defendant and the law enforcement agency that investigated the case may likewise file with the clerk of the court statements of their views respecting the defendant and the crime of which he was convicted. Forthwith after the filing of such statements and reports, the clerk of the court shall mail a copy thereof, certified by such clerk, with postage thereon prepaid, addressed to the Department of Corrections at the prison or other institution to which the person convicted is delivered. The clerk shall also mail a copy of any statement submitted by the court, district attorney, or law enforcement agency, pursuant to this section, with postage thereon prepaid, addressed to the attorney for the defendant, if any, and to the defendant in care of the Department of Corrections, and a copy of any statement submitted by the attorney for the defendant, with postage thereon prepaid, shall be mailed to the district attorney."

existed at the time Thomas was released. Next, it is within the discretion of a state to permit attendance of visitors and observers at parole hearings, even though such persons may not be permitted to oppose a specific determination or act as advocates for a particular inmate. California had such a policy in existence at the time of Thomas' release, pursuant to the Adult Authority Policy Statement # 3.[46]

Another alternative to § 1983 liability is the creation of public opposition to a proposed parole and the willingness of a parole body to recognize the problem of "improvident" parole releases as indicated by such public opposition. Such an alternative was recognized in the case of *In re Fain*, 65 Cal.App.3d 376, 135 Cal.Rptr. 543 (1976). In *In re Fain*, the California Court of Appeal held the trial court erroneously concluded that a decision granting a prisoner parole had become so terminally "final," once it had been recommended and approved that the Adult Authority subsequently lost its inherent power to reconsider the action in the sense that its jurisdiction had lapsed. The court further held that under a rule setting out as a "ground" on which a parole recision may be based any "new information" indicating that parole should not occur, the Adult Authority's awareness of the public outrage at the prospect of the prisoner's release from prison was such "new information," and was an appropriate ground for holding a recision hearing.

Although the office of a parole official is appointive, rather than elective, it is within the power and discretion of the appointing executive official to replace a parole official for incompetence and/or an inability to implement the purposes

[46] *See* attached Appendix.

and functions of a parole system without unnecessarily exposing the general public to unreasonable risks of harm. One advantage of the parole official being appointed rather than elected is that the public will not have to suffer incompetent and/or ultra vires action until the next election. Rather, the appointing power, subject to the electoral process, will be able to remove such an official immediately upon cause.

Finally, it is within the purview of a state to enact some form of reparations system for victims of crime, including recidivistic acts of violence. At the time of Thomas' release, already in existence was California's Victims of Crime Act[47]/ providing, pursuant to public interest, indemnification and assistance in the rehabilitation of those residents of the State of California who as a direct result of violent crime suffer pecuniary loss.

Appellees submit that the foregoing alternatives are clearly superior to § 1983 liability on the part of parole officials and will permit individual states and the United States government to experiment with the parole process so that maximum opportunities for rehabilitation can be achieved while the prospect of harm to members of the general public is minimized and/or compensated for.

47/ California Government Code sections 13959, et seq. *See* attached Appendix.

III.

NEGLIGENCE IS NOT A PROPER BASIS FOR RELIEF UNDER 42 U.S.C. § 1983

This Court has never ruled on the question of whether "simple negligence" can give rise to § 1983 liability, expressly deferring the issue in two recent decisions. *Baker v. McCollan, supra,* 47 U.S.L.W. 4834, 4835 (1979); *Procunier v. Navarette, supra,* 434 U.S. 555, 566, fn. 14. Appellees submit that portion of appellants' complaint alleging intentional and/or malicious conduct is a tissue of conclusionary pleading which should be given no weight in the review of this case,[48]/ that the complaint can, therefore, be reduced to a claim of simple negligence (poor judgment in releasing Thomas) on the part of these parole officials, and that, therefore, the issue of "simple negligence" is

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48/ The courts have uniformly held that conclusions of law and/or unwarranted deductions of fact are not admitted. *See, e.g., Newport News Co. v. Schauffler,* 303 U.S. 54, 57 (1938); *Sherman v. Yakahi,* 549 F.2d 1287, 1290 (CA9 1977); *Nickens v. White,* 536 F.2d 802, 803 (CA8 1976) (although civil rights pleading should be liberally construed it must nonetheless not be conclusionary); *Koch v. Yunich,* 533 F.2d 80, 85-86 (CA2 1976) (civil rights complaints must contain specific allegations of fact indicating a deprivation of civil rights, rather than state simple conclusions); *Curtis v. Everette,* 489 F.2d 516, 521 (CA3 1973), *cert. denied,* 416 U.S. 995 (1974), (conclusionary allegations, such as "intentionally, wilfully and recklessly," without supporting facts are not sufficient to make out a complaint under 42 U.S.C. § 1983); *Finley v. Rittenhouse,* 416 F.2d 1186, 1187 (CA9 1969). This rule of pleading has been particularly emphasized with respect to § 1983 actions brought against parole officials for determinations of parole status. *Williams v. Dunbar,* 377 F.2d 505, 506 (CA9 1967); *Richardson v. Rivers,* 335 F.2d 996, 999 (CA D.C. 1964).

once again tendered for the Court's consideration as being fairly comprised within the questions involved in this appeal. The Court's Rule 23(1)(c).

In order to state a claim cognizable under § 1983, a plaintiff must show (1) that public officials have intentionally deprived him of a right secured by the federal constitution and (2) that such deprivation was effected under state law. *Paul v. Davis, supra,* 424 U.S. 693, 696-697 (1976).

In *Monroe v. Pape, supra,* 365 U.S. 167, 187 (1961), the Court dispensed with any need for a showing that a public official being sued under § 1983 had *specifically* intended to violate a plaintiff's constitutional rights.[49]/ In stating that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe* was referring to its own facts showing intentional conduct by police officers so flagrant that they were bound to know it would, as a "natural consequence," deprive plaintiffs of their constitutional rights.[50]/ So viewed, *Monroe* is entirely consistent with the Court's present standard articulated in a series of recent decisions that public officials are liable under § 1983 only if they act intentionally either with malicious

[49]/ Of course negligent conduct was not at issue and was not considered by the Court in *Monroe*. However, *Monroe* did not dispense with the need to show that the conduct engaged in was intentional.

[50]/ *See,* McCormack, *Federalism and Section 1983,* 60 Va. L.R. 1, 54-55 (1974); *see also* 2 Devitt and Blackmar, *Fed. Jury Proc. & Prac.,* 177 (Intent--defined), 156 (Negligence--defined), 285-290 (Civil Rights cases).

intent to cause a deprivation of rights or with deliberate indifference to "clearly established" rights of which they know or reasonably should have known. Negligent conduct is not within such a formulation.

A. Congress Intended To Impose Liability For Intentional Conduct Only

"Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia v. Carter,* 409 U.S. 418, 425 (1973), *rehearing denied,* 410 U.S. 959. The controlling concern of the proponents of the legislation was the wave of violence and terror perpetrated by the Ku Klux Klan against both blacks and their white sympathizers. *Id.* However, equally important was the legislator's concern for the inaction of the state and local governments to control the situation.[51]/ *Id.,* at 426. For example, Representative James A. Garfield of Ohio, the future President, noted that the problem was not that state laws were inadequate, "but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection. . . ."[52]/

As one commentator has noted:

[51]/ *See Chapman v. Houston Welfare Rights Organization,* ____ U.S. ____, 47 U.S.L.W. 4528, 4531, fn. 25 (1979).

[52]/ Cong. Globe, 42nd Cong., 1st Sess. 390 (1871), Appendix 153.

> "The debates thus lay bare the background of the bill: Outlaws whipping, robbing and murdering with the tacit complicity (if not the active conspiracy) of those responsible for the enforcement of local police regulations."[53]/

Thus, the conduct for which the Ku Klux Klan Act was to provide a remedy was intentional conduct, of the type classified either as crimes or intentional torts, which resulted in the deprivation of a fourteenth amendment right. Nothing in the history or statutory language itself refers to negligence in any form.[54]/

Neither does the use of the word "neglect" in the Act import negligence. The word is used only in § 1986 and not in § 1983.[55]/ Its meaning in § 1986 was explained by Representative Burchard of Illinois who said liability attached only when "secret combinations of men are *allowed* by the Executive to band together to deprive one class of citizens of their legal rights

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53/ Shapo, *Constitutional Tort: Monroe v. Pape and Beyond*, 60 Nw. U.L.R. 277, 281 (1965).

54/ Negligence has been considered a separate tort since 1825 (W. Prosser, *Law of Torts*, p. 140 (4th ed. 1971), well before adoption of § 1983.

55/ The specific inclusion of the term "neglect" in § 1986, but not in § 1983, was deliberate and evinces a congressional intent to limit § 1983 to affirmative intentional conduct. (*Compare Monroe v. Pape* (365 U.S. at 187) considering the omission of the word "wilfully" in § 1983.) Such intentional conduct includes a refusal to act upon a request to perform a clear duty. The "deliberate indifference" of *Estelle v. Gamble*, 429 U.S. 97 (1976), seems to center about the refusal to act, rather than the erroneous exercise of professional judgment as is allegedly involved in this case. *Id.*, at 104, fn. 10.

without a proper effort to discover, detect and punish the violations of law and order." Cong. Globe, 42d Cong., 1st Sess., App. 315 (emphasis added). Thus, § 1986 imposes liability on a ". . . person who, having knowledge . . . and having power to prevent or aid in preventing . . . *neglects* . . . . so to do. . . ." (Emphasis added.) Liability under § 1986 requires an unwillingness to act in the face of actual knowledge. *See, Hampton v. City of Chicago*, 484 F.2d 602, 610 (7CA 1973) *cert. denied*, 415 U.S. 917 (1974). This is wanton conduct, not mere negligence.

It is clear then that only intentional conduct was meant to be proscribed by the enactment of § 1983.

B. This Court's Decisions Confine § 1983 To Intentional Conduct

In *Monroe v. Pape, supra*, 365 U.S. 167, the Court did not dispense with the need to allege a general intent to engage in conduct which results in a constitutional deprivation and certainly did not hold that negligent conduct which produced such a result was actionable. The conduct alleged in *Monroe* was purely intentional, flagrantly so. Further, in *Monroe*, the Court indicated that it was concerned with "an official's *abuse of his position*." 365 U.S. at 172 (emphasis added).[56]/

56/ In his dissenting opinion in *Paul v. Davis, supra*, 424 U.S. 693, 717, Mr. Justice Brennan quotes the above language from *Monroe* with the same emphasis, but leaves open the question "whether or not mere negligent official conduct in the course of duty can ever constitute such abuse of power." In discussing tort claims against public officials generally, Professor Louis D. Jaffe has stated: "Our central concern is the control of official power. . . . This means, for one

(Footnote 56 continued on page 62.)

The subsequent recognition of a qualified immunity for police officers in *Pierson v. Ray, supra,* 386 U.S. 547, based on good faith demonstrates that intentional conduct was the focus of § 1983, for two reasons. First, the alleged conduct in *Pierson* was intentional. 386 U.S. at 555-557. Second, the assertion of subjective good faith as a matter of common sense is addressed solely to intentional conduct or deliberate omission. Under *Pierson*, the officer also had to act pursuant to a reasonable belief to assert good faith. This objective element of the immunity standard cannot co-exist with negligence, which by definition, is unreasonable behavior because "[i]n the light of the recognizable risk, the conduct, to be negligent, must be unreasonable. . . ." Prosser, *Law of Torts,* 146 (4th ed. 1971).

After *Pierson* came *District of Columbia v. Carter, supra,* 409 U.S. 418. There, the Court reversed a Court of Appeals' decision which included *dicta* that a public official might be liable in negligence under § 1983. *Carter v. Carlson,* 447 F.2d 358, 365 (CA D.C. 1971). This Court reversed on other grounds, but stated: [W]e intimate no view on the merits of respondent's claims insofar as they are "predicated on other theories of liability." 409 U.S. at 420, fn. 3.

Then, in rapid succession, came *Wood v. Strickland, supra,* 420 U.S. 308, *Rizzo v. Goode,* 423 U.S. 362 (1976), *Paul v. Davis, supra,* 424 U.S. 693, *Estelle v. Gamble, supra,* 429 U.S. 97, and *Procunier v. Navarette, supra,* 434 U.S. 555.

(Footnote 56 continued)

thing that our emphasis will be on deliberated rather than negligent conduct, on misuse of power rather than inadvertent miscalculation." Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 Harv. L.R. 209 (1963).

In *Wood* (420 U.S. 308 (1975)),[57] this Court gave definition and content to the qualified immunity afforded public officials in *Pierson v. Ray* and in *Scheuer v. Rhodes*. The court stated that a public official had a qualified immunity for good faith conduct and became liable for damages under § 1983 only when he acted either with "malicious intent" to cause a deprivation of constitutional rights or in disregard of "clearly established" constitutional rights of which he knew or reasonably should have known. 420 U.S. at 322. This liability attaches only when settled, unquestioned constitutional rights are involved of ascertainable persons affected by the conduct in question. *Id.*

Less than one year after *Wood,* the court decided *Rizzo v. Goode, supra.* There, the plaintiffs sought an injunction under § 1983 to impose a constitutional duty on supervisory city officials for failing to act to eliminate police misconduct. *Id.*, at 376. This Court stated that a persistent pattern of police misconduct alone was insufficient. A showing that it was based on *deliberate policy of the supervisory officials (Id.,* at 374)[58] or flowed form an *intentional* effort to invade constitutional rights (*Id.,* at 375),[59] was also required. Thus, in the context of injunctive relief, more than a deprivation of rights must be shown, *deliberate* participation by the public officials sought to be enjoined is required. A failure to act, presumably through negligence, is insufficient to justify relief. *Id.*, at 376.

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[57] *See also, O'Connor v. Donaldson, supra,* 422 U.S. 563, 577.

[58] As was true in *Hague v. C.I.O.,* 307 U.S. 496 (1939).

[59] As was true in *Allee v. Medrano,* 416 U.S. 802, 812, 814-815 (1974).

Only two months after *Rizzo, Paul v. Davis, supra,* 424 U.S. 693, was filed. In strongly worded *dicta,* the Court rejected the notion that § 1983 made actionable all common-law torts engaged in by state officials. Specifically, it stated that the fourteenth amendment was not "a font of tort law to be superimposed upon whatever systems may already be administered by the States." (424 U.S. at 701.) See also, *Griffin v. Breckenridge,* 403 U.S. 88, 100-102 (1971). Concern was indicated lest "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" be thought to have claims under § 1983. *Id.* at 698. The majority rather clearly indicated that negligent torts were singularly inappropriate for application of § 1983. *Id.,* at 698-699. Moreover, the dissent did not contest the majority's evident disapproval of negligence as a basis of § 1983 liability.[60]/

Then, the Court announced its decision in *Estelle v. Gamble, supra,* 429 U.S. 97, holding that allegations of negligence in medical treatment by prison officials at most state a cause of action for malpractice cognizable in state courts. A cause of action under § 1983 is available only where prison personnel intentionally deny or delay a prisoner access to medical care or intentionally interfere with the treatment once prescribed, so as to evidence a "deliberate indifference" to a prisoner's serious illness or injury. (429 U.S. at 104-105.)

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[60]/ *See,* footnote 56, *ante.*

In *Estelle,* this Court recognized that though prison officials had a duty to provide medical care to prisoners and injury resulted, the nature and quality of the conduct and not simply its consequences had to be evaluated to determine whether there was a § 1983 claim. Thus, the Court of Appeals erred when it held that § 1983 "places no narrow limitation on the nature and quality of the conduct which it makes actionable but concerns itself entirely with the consequences of that conduct." Even though the harmful consequences may be identical, under *Estelle* only when they result from deliberate indifference, and not simply from negligence, is there a § 1983 cause of action.

In *Procunier v. Navarette, supra,* 434 U.S. 555, the Court had granted certiorari to determine whether prison officials could be liable under § 1983 for negligent interference with a prisoner's constitutional mail privileges. *Id.,* at 559-560. Because the Court disposed of the case on immunity grounds, the negligence issue was not resolved by the Court. *Id.,* at 566. However, Mr. Chief Justice Burger in his dissent stated:

> "Neither the language nor the legislative history of § 1983 indicates that Congress intended to provide remedies for negligent acts.
>
> "I would hold that one who does not intend to cause and does not exhibit deliberate indifference to the risk of causing the harm that gives rise to a constitutional claim is not liable for damages under § 1983."

The majority of federal circuits have held that mere negligence does not state a claim under § 1983. See *Bonner v. Coughlan,* 545 F.2d 565, 568, fn. 8 (CA7 1976), and cases cited therein. The cases of this Court and the circuits give implicit

recognition to the primary deterrent rationale of the statute. A § 1983 remedy might well deter deliberate conduct or omission, but is not likely to have much impact on inadvertent negligence. Permitting trials to go forward seeking money damages for negligent conduct against parole officials will not achieve rehabilitation or insure against recidivistic crime. It will have the reverse effect: capable personnel will leave or be discouraged from entering parole service.

Moreover, the burden of Civil Rights litigation on the federal courts is well documented and cannot be ignored.[61]/ The fears expressed by many congressman in 1871 that the act would work an imbalance in our system of federalism is slowly being realized whenever lower federal courts open their doors to new theories of liability not contemplated by the originators of the legislation. To hold that negligence in any form states a federal claim will subject to the burden of a jury trial and possible liability in damages, thousands of state and local public officials.

In sum, both the historical origins of § 1983 and the decisions of the Court teach that intentional conduct or a wilfull failure to act evincing deliberate indifference to settled rights -- and not negligence -- states a cause of action under the statute. Here, appellants' complaint, when stripped of improper conclusionary pleading, is reduced to a claim of poor "professional judgment" which does not give rise to a § 1983 action. *See Estelle v. Gamble, supra,* 429 U.S at 104-105 and fn. 10.

61/ *See,* McCormack, *Federalism and Section 1983,* 60 Va. L.R. 1 (1974).

IV.

CALIFORNIA GOVERNMENT CODE SECTION 845.8(a) GRANTING IMMUNITY TO A PAROLE OFFICIAL FOR A DETERMINATION TO RELEASE A PRISONER DOES NOT VIOLATE THE TWIN CONSTITUTIONAL CONCEPTS OF DUE PROCESS AND EQUAL PROTECTION

Appellants also argue that the concepts inherent in the due process and equal protection clauses of the Fourteenth Amendment render unconstitutional California Government Code section 845.8(a) which grants to a parole official immunity for a determination to release a prisoner. Appellants contend the immunity statute deprived Mary Ellen Martinez of the fundamental constitutional right to life. *See* Brief of Appellants, at 26-31. However, neither Government Code section 845.8(a) nor the California Court of Appeal opinion below infringes any "fundamental right" or creates any "suspect classification" that would require strict scrutiny under due process and equal protection standards. Therefore, the statute in issue must be upheld if it is rationally related to a legitimate governmental interest. As demonstrated below, the legitimate state interest in extending immunity to parole officials for their determinations to release prisoners on parole more than satisfies this constitutional standard.

A. Neither Government Code Section 845.8(a) Nor The Decision Below Infringes Any "Fundamental Right" Or Creates A "Suspect Classification"

This Court has held repeatedly that where government employs suspect classifications, such as race, or impinges upon

"fundamental rights," the Court will employ strict scrutiny and invalidate state action unless justified by a compelling state interest. *See e.g., Loving v. Virginia,* 388 U.S. 1 (1967) (racial classification); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (fundamental right of interstate travel); *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 (1966) (invalidation of the Virginia poll tax). Any other governmental action complies with equal protection and due process, however, as long as the classifications employed are "rationally related to a legitimate state interest." *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). As Mr. Justice Douglas articulated in *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955):

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Citations omitted.] We emphasize again what Chief Justice Waite said in *Munn v. Illinois,* 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"

In this case, appellants urge a "fundamental right" has been violated. The obvious flaw in appellants' somewhat unfathomable "fundamental right" argument is the simple fact that neither California Government Code section 845.8(a) nor the decision below abridges or affects the right to life or any other constitutionally recognized fundamental right.

California Government Code section 845.8(a) is part and parcel of the California Tort Claims Act (California

Government Code sections 810, et seq.) enacted by the California Legislature in 1963 in response to the California Supreme Court's abolition of the doctrine of governmental immunity in California in the case of *Muskopf v. Corning Hospital Dist.,* 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961). Following the *Muskopf* decision the California Legislature elected to abolish common-law governmental tort liability by adoption of a comprehensive statutory scheme implementing the general principle that governmental liability in California would be coextensive with tort liability for private individuals, with certain exceptions embodied in immunity statutes, one of which is California Government Code section 845.8(a). The California courts have upheld the constitutionality of the California Tort Claims Act. *County of Los Angeles v. Superior Court,* 62 Cal.2d 839, 44 Cal.Rptr. 796, 402 P.2d 868 (1965); *Datil v. City of Los Angeles,* 263 Cal.App.2d 655, 660, 69 Cal.Rptr. 788 (1968). A state's regulation of the nature and scope of, and procedure for, governmental tort liability, rather than involving a fundamental right to life, is more akin to state regulation of business or industry referred to by the Court in *Williamson v. Lee Optical Co., supra,* 348 U.S. 483. The decision below, rather than violating any fundamental constitutional right, merely holds that the immunity doctrine prevents application of one particular common-law remedy -- a civil suit for money damages -- with regard to claims of improper release of parolees leveled against parole officials. As has been established by this Court a "person has no property, no vested interest, in any rule of common law," (*Munn v. Illinois,* 94 U.S. 113, 134 (1876); *accord Mondou v. New York, New Haven & Hartford Railroad Co.,* 223 U.S. 1, 50 (1912)), and limitations on common-law rights and causes of action "are relatively commonplace and have consistently been enforced by

the courts." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88, fn. 32 (1978).

This case involves no "suspect classification" that would call for strict scrutiny standards. Application of the immunity doctrine to parole officials, rather than creating a classification based upon any characteristics applies to every member of the general public. Thus, as long as legislative judgments are "rational and not invidious," the Court has not seen fit to invalidate a state statute on constitutional grounds.

B. The Doctrine Of Immunity For Parole Officials Promotes Legitimate And Important Governmental Interests

Since the doctrine of immunity for parole officials in connection with their determinations to release inmates on parole does not infringe upon any fundamental right or involve any suspect classification, the due process and equal protection provisions of the Fourteenth Amendment are not violated so long as the statute is "rationally based" and "rationally related to the achievement" of "legitimate" governmental interests or objectives. *Weinberger v. Salfi*, 422 U.S. 749, 769, 770 (1975); *accord e.g., Mathews v. De Castro*, 429 U.S. 181, 185 (1976). As demonstrated in section IIB, *supra*, immunity for parole officials in connection with their determinations to release inmates on parole promotes legitimate and important governmental interests.

The policies served by the immunity doctrine for parole officials are the same as the interests which underlie immunity for prosecutors and judges, *i.e.*, ensuring that parole officials'

energies are not deflected from their duties to the administration of the rehabilitation process, and helping to guarantee that these parole officials will be able to exercise their independence of judgment required by the governmental function unfettered by any fear of tort liability. *See Imbler v. Pachtman, supra*, 424 U.S. at 423.

It was precisely these interests the California Legislature had in mind when it enacted California Government Code section 845.8(a). Indeed, the Approved Law Revision Commission Comment to section 845.8(a) underscores the State's awareness of these interests:

> "This section is a specific application of the discretionary immunity recognized in California cases and in Section 820.2. The extent of the freedom that must be accorded to prisoners for rehabilitative purposes and the nature of the precautions necessary to prevent escape of prisoners are matters that should be determined by the proper public officials unfettered by any fear that their decisions may result in liability."

California courts have always construed such law revision comments as important guides in interpreting and applying the California Tort Claims Act. *See e.g., Van Arsdale v. Hollinger*, 68 Cal.2d 245, 66 Cal.Rptr. 20, 437 P.2d 508 (1968). Appellees respectfully submit that the legitimate and rational governmental purposes enunciated in the approved Law Revision Commission Comment to section 845.8 are sufficient to render that section constitutional as against any challenge appellants have presented. Appellants respectfully submit that California Government Code section 845.8(a) and the opinion of the California Court of Appeal below are not only rational,

but also essential in order to enable parole officials to fulfill their obligations to the rehabilitative process of our penological system and, thus, to society.

CONCLUSION

For the foregoing reasons, appellees urge this Court to affirm the decison below, upholding the absolute immunity for officials in § 1983 actions in connection with their determinations to release inmates and, upholding the constitutionality of California Government Code section 845.8(a).

Respectfully submitted,

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APPENDIX

ADULT AUTHORITY POLICY STATEMENT

"VISITORS AND/OR OBSERVERS ATTENDING ADULT AUTHORITY HEARINGS"

The Adult Authority, while not permitting persons to appear in opposition to or advocates for any particular inmate, has since its inception followed the policy of inviting as its official guests, legislators, judges, members of grand juries, law enforcement officials, prospective employers of parolees, union officials, representatives of the press, educators and other interested persons to attend its hearings. Wardens and Superintendents have also invited guests of the institution to attend Adult Authority hearings. Members of the institution and Departmental Staff attend Adult Authority hearings for the purpose of in-service training.

The following policies have been adopted by the Adult Authority pertaining to the visiting program:

1. **Responsibility of the Classification and Parole Representative**

   The Classification and Parole Representative at each institution is responsible for making final arrangements for, and scheduling visitors at Adult Authority hearings in conformance with existing procedures.

   He will also be responsible for preparing a schedule of visitors and observers to attend the various panel hearings; this schedule will include both the name and official position or other reference data pertaining to the visitor.

   All visitors and observers, excepting those staff members attending for the purpose of in-service training, should sign the official guest book. All visitors and observers should be given a copy of the pamphlet "A Visitors Guide For Attendance at a Hearing of the California Adult Authority" and be

personally introduced to the panel members. When possible all official guests should be introduced to all Adult Authority Members present at an institution.

2. **Conduct of Visitors**

The decorum of visitors, observers, staff, and others should be essentially the same as in a court of law.

They must be informed of the confidentiality of the case data and material covered in the interview. Visitors are requested to refrain from moving about, whispering, taking notes or talking to the inmate during the interview. The panel members will be pleased to answer questions after the inmate has left the room.

Visitors should enter the hearing room when official business has recessed at the midmorning period. In no case should any person enter or leave the room during an interview.

3. **Assignment of Visitors (Observers) to Panels**

A. Without *prior* approval of panel members, no more than three visitors may observe any panel hearing. Visitors should be seated outside the visual range of the inmate and never behind a panel member.

B. Women visitors are welcome; however, they should be informed in advance that the panel may request they not observe a particular case if the issues are sensitive and their presence would be likely to affect the hearing.

C. Visitors, including staff, should be screened carefully so that no one will visit a panel where a case may be of personal interest to him. This is especially true in the case of newspaper reporters who may be interested in an individual case. If the Adult Authority desires a certain visitor to hear a particular case, such desire will be made known to the Staff Representative.

4. **Scheduling of Visitors**

Care should be taken not to schedule visitors on the last day of the hearings as the panels may complete hearings ahead of schedule, or other commitments may interfere with devoting necessary time to visitors.

5. **Correctional Personnel as Visitors**

When correctional personnel are in attendance as visitors or for in-service training purposes, equipment and apparel such as rain gear, lunch pails, etc., should not be brought into the hearing room. Correctional officers, when attending as visitors, should remove their caps.

6. **Inmate Notification**

Provisions should be made to have the officer in charge of the line or some other responsible official determine in advance from the inmate whether or not he would object to the presence of visitors at his hearing, since some are sensitive to such intrusion. In fairness to the inmates who do object, their hearings should be deferred to a part of the calendar which will not be witnessed by visitors. This is particularly important when women visitors are involved and applies to both official visitors and uniformed or female institutional personnel attending for in-service training purposes.

7. **Visitors and Observers Attending P&CS Calendars and Special Meetings**

As these types of calendars primarily involve a review of case material as opposed to a hearing with the inmate or parolee present, and that only sufficient copies of the case material required by the official participants are available, it is not the policy of the Adult Authority to promote a visiting program for such Calendars. From time to time, staff members and official observers approved by the Chairman may attend for purposes of orientation or in-service training; under such conditions, advanced planning will be required to ascertain that the observer will have access to the case material required to follow the hearing.

CALIFORNIA GOVERNMENT CODE

§ 13959. Declaration of public interest

It is in the public interest to indemnify and assist in the rehabilitation of those residents of the State of California who as the direct result of a crime suffer a pecuniary loss.

(Added by Stats. 1973, c. 1144, p. 2348, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 1122, p. ____, § 1.)

§ 13960. Definitions

As used in this article:

(a) "Victim" shall mean:

(1) A person who sustains physical injury or death as a direct result of a crime of violence;

(2) Anyone legally dependent for his support upon a person who sustains physical injury or death as a direct result of a crime of violence; and

(3) In the event of a death caused by a crime of violence, any individual who legally assumes the obligation, or who voluntarily pays the medical or burial expenses incurred as a direct result thereof.

(b) "Crime of violence" shall mean a crime or public offense as defined in Section 15 of the Penal Code which results in physical injury to a resident of this state, including such a crime or public offense, wherever it may take place, when such resident is temporarily absent from the state. No act involving the operation of a motor vehicle, aircraft, or water vehicle which results in injury or death shall constitute a crime of violence for the purposes of this article, except that a crime of violence shall include:

(1) Injury or death intentionally inflicted through the use of a motor vehicle, aircraft, or water vehicle; or,

(2) Injury or death sustained in an accident caused by a driver in violation of Section 20001, 23101, 23102, 23105, or 23106 of the Vehicle Code.

(3) Injury or death sustained in an accident caused by a driver of a motor vehicle in the immediate act of fleeing the scene of a crime of violence in which he knowingly and willingly participated.

(c) "Board" shall mean the State Board of Control.

(d) "Pecuniary loss" shall mean the amount of medical or medical related expense and loss of income or support that the victim has incurred or will incur as a direct result of an injury or death to the extent that the victim has not been or will not be indemnified from any other source. Said loss shall be in an amount of more than one hundred dollars ($100) or shall be equal to 20 percent or more of the victim's net monthly income, whichever is less.

(Added by Stats. 1973, c. 1144, p. 2348, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 521, p. ____, § 1.)

§ 13961. Application for assistance

(a) A victim of a crime of violence may file an application for assistance with the board provided that the victim was a resident of California at the time the crime was committed and either:

(1) The crime was committed in California; or

(2) The person whose injury or death gave rise to the application was a resident of California who was injured or killed while temporarily outside the state.

(b) The board shall supply and make available application forms for this purpose.

(c) The period prescribed for the filing of an application for assistance shall be one year after the date of the crime, unless an extension is granted by the board, except that such period may be extended by the State Board of Control for good cause shown by the victim.

(d) The application for assistance shall be verified and shall contain the following:

(1) A description of the date, nature, and circumstances of the crime or public offense.

(2) A complete financial statement including but not limited to the cost of medical care or burial expense and the loss of wages or support the victim has incurred or will incur and the extent to which the victim has been or may be indemnified for these expenses from any source.

(3) When appropriate, a statement indicating the extent of any disability resulting from the injury incurred.

(4) An authorization permitting the State Board of Control to verify the contents of the application.

(5) Such other information as the board may require.

(Added by Stats. 1973, c. 1144, p. 2349, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 636, p. ____, § 1.)

§ 13961.5 Examination of sexual assault victims; costs

No costs incurred by a hospital or other emergency medical facility for the examination of the victim of a sexual assault, when such examination is performed for the purposes of gathering evidence for possible prosecution, shall be charged directly or indirectly to the victim of such assault. Such costs shall be treated as local costs and charged to the appropriate local governmental agency as follows:

(a) If the treatment or services are provided at a county or city hospital, or hospital district facility, the county shall pay the expenses.

(b) If the treatment or services are performed at a private hospital, the expenses shall be paid by the local governmental agency in whose jurisdiction the alleged offense was committed.

(Added by Stats. 1974, c. 1091, p. 2319, § 1.)

§ 13962. Review, verification, and consideration of application

(a) The staff of the board shall appoint a clerk to review all applications for assistance in order to insure that they are complete. If the application is not complete, it shall be returned to the victim with a brief statement of the additional information required. The victim, within 30 days of receipt thereof, may either supply the additional information or appeal such action to the board which shall review the application to determine whether or not it is complete.

(b) If the application is accepted, it shall be promptly verified by the staff of the State Board of Control. The board thereupon shall consider the application at a hearing at a time and place of its choosing. The board shall notify all interested persons not less than five days prior to the date of the hearing.

(c) The victim shall cooperate with the staff of the State Board of Control in the verification of the information contained in the application. Failure so to cooperate shall be reported to the board, which, in its discretion, may reject the application on this ground alone.

(Added by Stats. 1973, c. 1144, p. 2349, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 521, p. ____, § 2; Stats. 1977, c. 636, p. ____, § 2.)

§ 13963. Hearing

(a) At the hearing, the board shall:

(1) Review the application for assistance and the report prepared thereon and any other evidence obtained as a result of the investigation.

(2) Receive such other evidence as the board finds necessary or desirable properly to evaluate the application.

(b) If the victim chooses not to appear at the hearing, the board may act solely upon the application for assistance, the staff's report, and such other evidence as appears in the record.

(Added by Stats. 1973, c. 1144, p. 2350, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 636, p. ____, § 3.)

§ 13964. Approval of application; ineligibility for assistance

After having heard the evidence relevant to the application for assistance, the board shall approve the application if a preponderance of the evidence shows that as a direct result of the crime the victim incurred an injury which resulted in a pecuniary loss. However, no victim shall be eligible for assistance under the provisions of this article if:

(a) The board finds that the victim or the person whose injury or death gave rise to the application knowingly and willingly participated in the commission of the crime;

(b) The victim or the person whose injury or death gave rise to the application failed to cooperate with a law enforcement agency in the apprehension and conviction of the criminal committing the crime;

(c) The board finds that the victim should not be allowed to recover because of the nature of his involvement in the events leading to the crime or the involvement of the persons whose injury or death gave rise to the application.

(Added by Stats. 1973, c. 1144, p. 2350, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 521, p. ____, § 3; Stats. 1977, c. 1122, p. ____, § 2.)

§ 13965. Types of assistance

(a) If the application for assistance is approved, the board shall determine what type of state assistance will best aid the victim. The board may take any or all of the following actions:

(1) Authorize a cash payment to or on behalf of the victim equal to the pecuniary loss attributable to medical or medical related expenses directly resulting from the injury but not to exceed ten thousand dollars ($10,000);

(2) Authorize a cash payment to the victim equal to the pecuniary loss resulting from loss of wages or support directly resulting from the injury, but not to exceed ten thousand dollars ($10,000);

(3) Authorize cash payments not to exceed three thousand dollars ($3,000) to or on behalf of the victim for job retraining or similar employment-oriented rehabilitative services.

(b) Assistance granted pursuant to this article shall not disqualify an otherwise eligible victim from participation in any other public assistance program.

Cash payments made pursuant to this article may be on a one time or periodic basis. If periodic, the board may increase, reduce, or terminate the amount of assistance according to need, subject to the maximum limits provided in paragraphs (1), (2), and (3) of subdivision (a).

(c) The board may also authorize payment of attorney's fees representing the reasonable value of legal services rendered to the applicant, but not to exceed 10 percent of the amount of the award, or five hundred dollars ($500), whichever is less.

No attorney shall charge, demand, receive, or collect any amount for services rendered in connection with any proceedings under this article except as awarded under this section.

(Added by Stats. 1973, c. 1144, p. 2350, § 2, operative July 1, 1974.)

§ 13966. Subrogation; lien; disposition of proceeds

(a) The State of California shall be subrogated to the rights of the victim to whom cash payments are granted to the extent of the cash payments granted, less the amount of any fine imposed by the court on the perpetrator of the crime. Such subrogation rights shall be against the perpetrator of the crime or any person liable for the pecuniary loss.

(b) The state also shall be entitled to a lien on the judgment in the manner provided in Section 688.1 of the Code of Civil Procedure in the amount of such cash payments on any recovery made by or on behalf of the victim. The state may recover this amount in an separate action, or may intervene in an action brought by or on behalf of the victim. The state shall pay 25 percent of the amount of any recovery which is subject to a lien on the judgment in the manner provided in Section 688.1 of the Code of Civil Procedure to the county probation department or the victim responsible for recovery thereof from the perpetrator of the crime. The remaining 75 percent of the amount shall be deposited in the Indemnity Fund.

(c) In the event that the victim, his guardian, personal representative, estate, or survivors, or any of them, bring an action for damages against the person or persons liable for the injury or death giving rise to an award by the board under this article, notice of institution of legal proceedings, notice of settlement and all other notices required to be given to the judgment debtor pursuant to Chapters 1 (commencing with Section 681) and 2 (commencing with Section 714) of Title 9 of Part 2 of the Code of Civil Procedure, shall be given to the board in Sacramento except in cases where the board specifies that notice shall be given to the Attorrney General. All such notices shall be given by the attorney employed to bring this action for damages or by the victim, his guardian, personal representative, estate, or survivors, if no attorney is employed.

(Added by Stats. 1973, c. 1144, p. 2351, § 2, operative July 1, 1974. Amended by Stats. 1976, c. 661, p. 1631, § a; Stats. 1977, c. 521, p. ——, § 4.)

§ 13969. Payment of claims

Claims under this article shall be paid from a separate appropriation made to the State Board of Control in the Budget Act and as such claims are approved by the board.

(Added by Stats. 1973, c. 1144, p. 2352, § 2, operative July 1, 1974.)

§ 13969.1 Decisions; reconsiderations; judicial review

(a) The decisions of the board shall be in writing. Copies of the decisions shall be delivered to the applicant or to his representative personally or sent to them by mail.

(b) The board itself may order a reconsideration of all or part of the application for assistance on its own motion or on written request of the applicant or his representative. The board may not grant more than one such request on any application for assistance. The board shall not consider any such request filed with the board more than 30 days after the personal delivery or mailing of the original decision.

(c) Judicial review of a final decision made pursuant to this article may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the board. Such petition shall be filed as follows:

(1) Where no request for reconsideration is made, within 30 days of personal delivery or mailing of the board's decision on the application for assistance.

(2) Where a timely request for reconsideration is filed and rejected by the board, within 30 days of personal delivery or mailing of the notice of rejection.

(3) Where a timely request for reconsideration is filed and granted by the board, or reconsideration is ordered by the board, within 30 days of personal delivery or mailing of the final decision on the reconsidered application.

(Added by Stats. 1977, c. 521, p. ____, § 5.)

§ 13969.1 Decisions of board; notice; reconsideration; mandamus petitions; time

(a) The decisions of the board shall be in writing. Copies of the decisions shall be delivered to the applicant or to his representative personally or sent to them by mail. It is the intent of the Legislature in enacting this provision to assure reasonable notice of a decision of the board to an applicant, and it is not the intent of the Legislature to require the board to issue a formal opinion in any case.

(b) The board itself may order a reconsideration of all or part of the application for assistance on its own motion or on written request of the applicant or his representative. The board may not grant more

than one such request on any application for assistance. The board shall not consider any such request filed with the board more than 30 days after the personal delivery or 60 days after the mailing of the original decision.

(c) Judicial review of a final decision made pursuant to this article may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the board. Such petition shall be filed as follows:

(1) Where no request for reconsideration is made, within 30 days of personal delivery or within 60 days of the mailing of the board's decision on the application for assistance.

(2) Where a timely request for reconsideration is filed and rejected by the board, within 30 days of personal delivery or within 60 days of the mailing of the notice of rejection.

(3) Where a timely request for reconsideration is filed and granted by the board, or reconsideration is ordered by the board, within 30 days of personal delivery or within 60 days of the mailing of the final decision on the reconsidered application.

(Added by Stats. 1977, c. 1122, p. ____, § 4.)

For another section of the same number added by Stats. 1977, c. 521, p. ____, § 5, see § 13969.1, ante.

§ 13967. Fines and penalty assessments; imposition; disposition of proceeds

Upon a person being convicted of a crime of violence committed in the State of California resulting in the injury or death of another person, if the court finds that the defendant has the present ability to pay a fine and finds that the economic impact of the fine upon the defendant's dependents will not cause such dependents to be dependent on public welfare the court shall, in addition to any other penalty, order the defendant to pay a fine commensurate with the offense committed, and with the probable economic impact upon the victim, of at least ten dollars ($10) but not to exceed ten thousand dollars ($10,000). In addition to any other penalty, upon a person being convicted of any other felony or misdeameanor there shall be levied a penalty assessment of ten dollars ($10) for each felony conviction and five dollars ($5) for each misdemeanor conviction upon every fine, penalty, and forfeiture imposed and collected by the courts.

Any fine or penalty assessment imposed pursuant to this section shall not be subject to any penalty assessment imposed pursuant to Section 13521 of the Penal Code. The fine or penalty assessment imposed pursuant to this section shall be deposited in the Indemnity Fund in the State Treasury, hereby continued in existence, and the proceeds of which shall be available for appropriation by the Legislature to indemnify persons filing claims pursuant to this article.

(Added by Stats. 1973, c. 1144, p. 2351, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 1122, p. ____, § 3.)

§ 13968. Rules and regulations; notice of provisions of chapter

(a) The State Board of Control is hereby authorized to make all needful rules and regulations consistent with the law for the pruposes of carrying into effect the provisions of this notice.

(b) It shall be the duty of every hospital licensed under the laws of this state to display prominently in its emergency room posters giving notification of the existence and general provisions of this chapter. The board shall set standards for the location of such display and shall provide posters, application forms and general information regarding the provisions of this chapter to each hospital and physician licensed to practice in the State of California.

(c) It shall be the duty of every local law enforcement agency to inform victims of violent crimes of the provisions of this chapter and to provide application forms to victims who desire to seek assistance pursuant to this article. The board shall provide application forms and all other documents which local law enforcement agencies may require to comply with this action. The board shall set standards to be followed by local law enforcement agencies for this purpose and may require them to file with the board a description of the procedures adopted by each agency to comply.

(Added by Stats. 1973, c. 1144, p. 2351, § 2, operative July 1, 1974. Amended by Stats. 1977, c. 636, p. ____, § 4.)